Boston College Law School
Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

10-1-2010

# Counseling Community Groups

Paul R. Tremblay
*Boston College Law School*, paul.tremblay@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/lsfp

Part of the Ethics and Professional Responsibility Commons, and the Law and Society Commons

Recommended Citation
Paul R. Tremblay. "Counseling Community Groups." *Clinical Law Review* 17, (2010): 389-468.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

# COUNSELING COMMUNITY GROUPS

PAUL R. TREMBLAY*

TABLE OF CONTENTS

INTRODUCTION ..... 391 R
I. THE BENCHMARK: COUNSELING INDIVIDUAL CLIENTS .. 397 R
II. "GROUP" CLIENTS ..... 404 R
III. COUNSELING GROUP CLIENTS ..... 407 R
A. *Counseling Joint Clients* ..... 407 R
B. *Counseling Well-Structured Group Clients* ..... 413 R
C. *Counseling Loosely-Structured Group Clients* ..... 421 R
1. *Representation of a Loosely-Structured Group* .. 421 R
2. *Counseling a Loosely-Structured Group* ..... 438 R
IV. COUNSELING COMMUNITY GROUP CLIENTS ..... 455 R
A. *Defining "Community Groups"* ..... 455 R
B. *Counseling Groups with a Public Mission* ..... 457 R
C. *Building Community* ..... 460 R
D. *Alienation, Oppression, and Positive Freedom* ..... 463 R
CONCLUSION ..... 467 R

ABSTRACT

*The training of lawyers for years has established ethical and practice protocols based upon an individual representation model, or, if the protocols contemplated a form of collective representation, they have envisioned formal, structured entities with powerful constituents. The good lawyers who represent the dispossessed, the exploited, and the powerless need to craft different protocols, ones which accept messier, less organized, and often contentious group representation. Writing about the ethical and political mission of "community lawyers" has flourished, but that scholarship has tended to elide some knotty practical questions about the lawyers' professional responsibilities in their work with such groups. This Article is a beginning at-*

* Clinical Professor of Law and Law Fund Research Scholar, Boston College Law School. I presented an early version of this Article at the conference entitled "The Pedagogy of Interviewing and Counseling," hosted by UCLA School of Law and Brigham Young University Law School and held at UCLA School of Law, and at a faculty colloquium at Boston College Law School, and I thank the participants at those workshops for their insights. I have also received helpful ideas from Mark Aaronson, Alexis Anderson, Susan Bennett, Paul Bergman, Michael Diamond and Judy McMorrow, and I thank those kind friends. I also thank Dean John Garvey and Boston College Law School for financial support, and Allison Diop-Frimpong and Josh Minty for valuable research assistance.

*tempt to review community group representation through the lens of a traditional "law of lawyering" perspective.*

*A lawyer who accepts a "community group" as her client must attend to all of the professional ethical mandates applicable to more conventional corporate and partnership representation. She must distinguish with great care whether her client is an aggregate of community members, or an entity, and much will depend on the outcome of that discernment. The lawyer must engage the group members to assist them to decide which of those statuses will apply, and, in doing so, she must be clear about her relationship with the members as they make that choice.*

*If the community group lawyer accepts the group as her client, she must uncover, or create, an authority scheme on which she may rely for her direction. Once she has accomplished that, the community group lawyer may counsel her clients in ways different from how she would counsel an individual client with an individual legal matter. In representing any entity, the lawyer will owe to the entity constituents a different—one might say lesser—deference for their preferences and their leanings, because of their status as proxies for a larger client. The more loosely-structured the entity is (and there is much evidence that community group representation will involve many loosely-structured groups), the greater the responsibility of the lawyer to ensure that the constituent with whom she meets is a faithful proxy for the wishes of the group.*

*In addition to attending to her ethical responsibilities emerging from the very fact that her client is a group, the community lawyer must recognize further special duties from the fact that her client is not just a group, but a community group. This Article uncovers three considerations peculiar to the community group representation context. For those groups with explicit public missions, the lawyer has a responsibility to attend to that public mission, in ways she may not have permission to do for groups established to achieve purely private ends. At the same time (and often at odds with the prior commitment), the community group lawyer must attend with special care to the empowerment and group cohesion aspects of the group's work. Finally (and, again, at odds with the prior commitment), the community group lawyer may at times possess some moral duty to intervene with her group client to establish conditions, even if not chosen by the group, that are likely to increase the autonomy and the power of the group in the long run.*

*The ideas developed in this Article emerge from the rich literature from so many progressive scholars over the past twenty-five years or more. The ideas need to be tested, nurtured and critiqued, though, especially by more stories from the field. The test of the ethical ideas will come from their usefulness in practice. This Article represents a beginning effort to offer a systematic structure, grounded in established theories of the law of lawyering, upon which to make*

*those ongoing assessments.*

## INTRODUCTION

"Community lawyering" is a prominent commitment among progressive legal scholars and clinical teachers.[1] Lawyers who work with poor and disadvantaged clients encounter those clients situated within important community contexts, and frequently as members of collectivities.[2] The rich literature of community lawyering aims to explicate the delicate relationship between the expert professional and her clients, with special reference to the power dynamics within those relationships,[3] to fostering group coherence,[4] and to conceptions of

[1] As Ascanio Piomelli (among others) has observed, the concept of community lawyering is known by many terms, including rebellious lawyering, critical lawyering, facilitative lawyering, and collaborative lawyering (although writers disagree about the fungibility of those terms). *See* Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 398 n.6. As the discussion in the text will make apparent, my subject is not limited to the "rebellious" version of working with disadvantaged communities, but easily (and perhaps most readily) applies to the "regnant" kind of work as well. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11-82 (1992) (contrasting rebellious and regnant lawyering). In addition to the many sources cited throughout this article, important contributions to the community lawyering literature include Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Anthony Alfieri, *Impoverished Practices,* 81 GEO. L.J. 2567 (1993); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); Susan D. Bennett, *Little Engines that Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469 [hereinafter Bennett, *Little Engines that Could*]; Christina Z. Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN. L. REV. 229 (2000); Michael Diamond, *Community Lawyering*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007); Zenobia Lai, et al., *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1 (2000); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449 (1999); Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

[2] *See* Bennett, *Little Engines that Could*, *supra* note 1, at 472-73; Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481, 486-87 (2004).

[3] *See* Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1750 (1994) (Book Review); Piomelli, *supra* note 1, at 446-49; Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 813 (1998) [hereinafter White, *Facing South*].

[4] *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005); Diamond & O'Toole, *supra* note 2.

"building community."[5] Prominent within this literature (sometimes implicitly so, but more frequently explicitly) is the contest between those traditional ethical bookends of autonomy and paternalism—that is, between a moral stance that views the professional's role as non-directive and respectful of the wisdom of clients, and one that accepts the professional's active intervention in the choice-making of the clients for the greater good of the clients.[6]

This Article contributes to that extensive conversation in one discrete but seemingly important way. In the spirit of what has come to be known (if perhaps controversially) as the "best practices" approach to lawyering,[7] my aim here is to understand the practical, workaday implications of advising a community group or its membership, especially (but not only) with disadvantaged groups. I invoke the "best practices" theme purposefully. While the ongoing scholarly conversations about working with disadvantaged communities are sophisticated and impassioned, they often sidestep—at times intentionally, at times seemingly not—questions about lawyering effectiveness and skill, professional responsibility, the laws of lawyering and, dare I say it, malpractice considerations. I write here for lawyers and law students beginning such a practice in an effort to understand with them the professional implications of this kind of work.[8]

---

[5] *See* MARK R. WARREN, DRY BONES RATTLING: COMMUNITY BUILDING TO REVITALIZE AMERICAN DEMOCRACY (2001); Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445 (2001).

[6] The autonomy/beneficence continuum has played a prominent role in medical ethics, *see, e.g.,* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 272-80 (6th ed. 2008) (describing how the principles interact), and, with homage to the medical ethicists, in legal ethics, *see, e.g.,* Mark Spiegel, *Lawyering and Client Decision-making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979). The critical scholarship addressing progressive lawyers and their work with disadvantaged clients has continued to struggle with those essential tensions, although in ways quite different from the medical field or the conventional legal ethics context. *See* text accompanying notes 282-307 *infra* for a discussion of the progressive critiques.

[7] In recent years the concept of "best practices" has appeared in a variety of contexts. *See, e.g.,* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOYD & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (known as the "Carnegie Report"); J.P. OGILVY, LEAH WORTHAM, AND LISA G. LERMAN, LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS (2007) (models of practice for students in out-placement settings). For a deep critique of the use of the "best practices" concept, see Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269 (2009). For a defense of the use of the concept, see Roy Stuckey, *"Best Practices" or Not, It Is Time to Re-Think Legal Education*, 16 CLINICAL L. REV. 307 (2009).

[8] My impetus to explore these questions is three-fold. Since 2008 I have directed and taught in a new transactional clinic at Boston College Law School, after many years of supervising students in various litigation clinics. My new encounter with group clients, nonprofits, and unincorporated associations has raised several questions for me and for my

This Article will examine the strategic and ethical implications for a lawyer engaged in the representation of, and more specifically the counseling of, community groups. My ideas emerge with great homage to the many colleagues who have written in the past about representation of community groups, and especially to three prominent scholars upon whose wisdom I draw a great deal—Susan Bennett,[9] Michael Diamond,[10] and Stephen Ellmann.[11] While I may not always agree with the arguments or proposals offered by these three writers (or they with me), their work deeply informs my analyses here.

If counseling community groups were a seamless application of conventional counseling practices, building on the pioneering insights of David Binder and Susan Price[12] and their progeny,[13] then a work such as this would have little of interest to say. In fact, however, counseling a community group is different in significant ways from the typical counseling conception used to teach that skill to law students and

students, questions which I puzzle through here. That new teaching responsibility coincides with my co-authors and I embarking upon a revision of an interviewing and counseling textbook, and one of my tasks on the new edition will be to address community group counseling. *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE, PAUL R. TREMBLAY & IAN WEINSTEIN, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (3d ed.) (forthcoming 2011). In addition, Alicia Alvarez and I are in the process of creating a new book to accompany a transactional clinic seminar curriculum, and that text will address the issues explored in this Article. *See* ALICIA ALVAREZ & PAUL R. TREMBLAY, TRANSACTIONAL CLINIC SEMINAR COMPANION (West Academic Publishing, forthcoming 2012).

[9] Susan Bennett, Director of the Community and Economic Development Law Clinic at American University's Washington College of Law, has written extensively and with great insight about lawyers working with community groups. *See* Susan D. Bennett, *Creating a Client Consortium: Building Social Capital, Bridging Structural Holes*, 13 CLINICAL L. REV. 67 (2006) [hereinafter Bennett, *Creating a Client Consortium*]; Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45 (2002) [hereinafter Bennett, *Embracing the Ill-Structured Problem*]; Bennett, *Little Engines that Could*, *supra* note 1; Susan D. Bennett, *Long Haul Lawyering*, 25 FORDHAM URB. L.J. 771 (1998).

[10] Michael Diamond, Director of the Harrison Institute for Housing and Community Development at the Georgetown University Law Center, has been a leading, if provocative, voice on questions of the proper role of lawyers working with fluid community groups. *See* Diamond, *supra* note 1; Diamond & O'Toole, *supra* note 2.

[11] Stephen Ellmann, Associate Dean for Faculty Development and Collaborative Learning at New York Law School, is the author of perhaps the most influential writing about representation of group clients. *See* Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

[12] In 1977, David Binder, then a young clinical professor at UCLA School of Law, and Susan Price, a professor of psychology at UCLA, created a pathbreaking work on interviewing and counseling in the legal profession. *See* DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH (1977).

[13] *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (2d ed. 2004)[hereinafter LAWYERS AS COUNSELORS].

lawyers—that of an individual client and his individual personal or commercial affairs. The differences stem from the fact that the lawyer is counseling a "group," and from the fact that the group is a "community" group. This Article will examine the implications of each of those factors separately. The goal of this Article is to meld insights from accepted ethical principles regarding group and entity representation with those from the rich "community lawyering" scholarship to craft workable and practical recommendations for lawyers engaged in this work.

The Article will work toward that goal in the following way. It begins with a refresher about the goals and the structures of what we might understand here as "conventional" counseling—the paradigmatic counseling of an individual client by a lawyer regarding some important legal decision affecting that individual's personal or business affairs. With that baseline established, the Article then turns to the ways in which a lawyer's practice would change if her client were not an individual, but instead were a "group." That discussion necessarily requires a clarification of terms, so that we know what we mean by a "group." As we shall see, a group may come to the lawyer in two guises—well structured, and loosely-structured. It is critical to distinguish between those types of groups, for a lawyer's responsibilities will be different in important ways depending upon the organizational integrity of the entity client.[14] It is equally important to distinguish a true group client from a collection of individual clients represented at the same time by the lawyer. For our purposes, that latter configuration may not meet the definition of a "group client," but, because of its importance to this area, the Article examines briefly the counseling strategies involved in working with multiple clients simultaneously.[15]

Using the conventional *Legal Interviewing and Counseling*-generated counseling model as a starting point, the Article recommends some adjustments to the standard approach for use in group client settings. The modifications stem primarily from the fact that the actors speaking for the client in the group setting are not clients at all, but are fiduciaries for the clients. That fact has moral and strategic implications for the lawyer, especially on the question of how directive the lawyer ought to be in her work with the client representative.[16] Two considerations seem important here. First, when representing a well-structured group, such as a formal corporation with authority schemes expressly in place, the lawyer's counseling of a constituent will approach but not equal the quality of deference the lawyer ought

[14] *See* text accompanying notes 84-85, 115 *infra*.
[15] *See* text accompanying notes 60-82 *infra*.
[16] *See* text accompanying notes 88-112 *infra*.

to pay to her individual client. Because effective counseling requires a lawyer to discern and mine the client's idiosyncratic needs, values, and degree of comfort with risk, the lawyer fails to serve her client well if she assumes that those qualities of the *constituent* are those of the client itself. She may presume such a match, but that presumption is a weak one, or can be in certain circumstances.

Second, when the lawyer works with a loosely-structured group, such as an informal homeowner's association with no formal corporate existence, her responsibilities increase substantially, as do her risks of getting things wrong, of course. The Article recognizes that under the law of lawyering and as a matter of substantive "corporate" law a lawyer may represent an informal group as an entity, rather than as a collection of individuals in the form of joint representation. (The Article seeks to unpack that distinction with some care, for it is rather elusive.) The critical consideration for the lawyer is transparency—to be certain that the individuals who form the membership within the loose association understand that the representation is as a group and not as an aggregation of individuals. The buy-in of the membership to the concept of group representation is a necessary (but not a sufficient) precondition to her proceeding on behalf of the entity. The Article then acknowledges the obligation of the lawyer to obtain from the unincorporated association a decisionmaking scheme binding upon the group. Without that element, the Article concludes, the lawyer cannot effectively proceed to represent the group.

Once the lawyer has the buy-in from the membership and a consensual scheme by which the lawyer may recognize authority from certain constituents representing the group's leadership, the lawyer's counseling role resembles that described above in the context of a well-structured group. The Article concludes, however, that a loosely-structured group with a consensual decisionmaking scheme is not a well-structured group. As a result, the Article contends, the lawyer's deference to the group's appointed constituents is even less strong than in the previous context. The Article draws support for this conclusion from two interlocking considerations—respect for the group's shared mission (and the lawyer's effort to achieve accuracy on that front) and the lawyer's professional interest in minimizing claims of malfeasance and breach of fiduciary duty to the group membership. The two considerations may be different ways of describing the same thing, but the Article treats them as separate factors warranting separate examination.

Understanding the best practices protocols and considerations when working with the varieties of group clients, while a significant part of this Article, only serves as the backdrop for the Article's ar-

ticulated mission, which is to consider a lawyer's work with *community* groups. This Article conceives of a community group in two guises. First, it accepts that many community groups possess a *public mission*. Not every group with a public mission is a community group, nor does every community group have a public mission. But that quality is sufficiently central to the role of so many community groups that the Article examines the responsibilities of lawyers representing groups with an articulated public mission (such as nonprofits). It argues that the mission implies fiduciary-like obligations on the part of the lawyer, obligations which are less robust in the private arenas.[17]

Another common conception of "community group" would describe members of a disadvantaged or under-resourced community banded together for a common end, even if that end does not qualify as a charitable or "public" one. The Article therefore examines separately the best practice protocols for lawyers working with groups of disadvantaged clients, to discern how that fact—the fact of poverty, of discrimination, or of oppression—alters the representational commitments of the group's lawyer. The Article comments on two such commitments emerging from the community lawyering literature.[18]

The first commitment connects to conceptions of empowerment and community-building. The Article's discussion acknowledges the strengths of those conceptions, but recognizes the potential, and sometimes inevitable, tension between successful pursuit of a group's public mission and the lawyer's dedication to group solidarity. An effective community lawyer needs to acknowledge that tension and discern how to accommodate it in her work with the group membership and its leadership. Recognition of that tension, in turn, triggers the second commitment addressed by the Article's final section. Some scholars recommend a more active role for the community lawyer to make space for a disadvantaged or oppressed community group to locate the power the group lacks, even if the group leadership or membership do not yet recognize the need for such space. The Article seeks to understand respectfully this set of arguments, and to harmonize its persuasiveness with the overall anti-paternalist strain within the community lawyering scholarship. It concludes with a plea for more textured, practice-driven *stories* justifying the more activist stance. Absent those stories, the activists' arguments have theoretical clout, but insufficient practical influence.

[17] *See* text accompanying notes 259-70 *infra*.
[18] *See* text accompanying notes 271-307 *infra*.

## I. The Benchmark: Counseling Individual Clients

This section describes what has emerged as the "default" orientation to counseling clients—a meeting between a lawyer and her individual client to assist with a difficult legal matter regarding that client's personal or business affairs, and about which the client must make an important decision or choice. It is of some interest that the one-on-one individual client interaction serves as the baseline model for this lawyering skill, but that observation is a solid one.[19] That default understanding also tends to address a paradigmatic kind of counseling experience—assisting a client to make a definitive choice among a finite set of alternatives.[20] While a lawyer's counseling responsibilities include other kinds of interactions—including, for example, offering straightforward advice about what the law is,[21] or assisting a client to develop some authority for the lawyer to use in negotiations[22]—those tasks receive less attention in the standard texts, and they are less relevant for our purposes.

For purposes of both respect and convenience, I will refer to the default understanding of individual counseling as the "Binder & Price" model,[23] while fully acknowledging that later writers, including David Binder and Susan Price themselves, have refined the early thinking about this skill set with tremendous insight and sophistication. But the basic conceptions offered by Binder & Price in 1977 remain valid today, even if they have generated considerable rich dis-

---

[19] The pioneering texts on the legal skills of interviewing and counseling tend to use individual clients as examples for their advice and models, and those examples tend to cover dispute resolution or litigation matters rather than transactional matters. The earliest and most influential book had that quality. *See* Binder & Price, *supra* note 12, at 53-103. While the collective understanding of effective counseling has grown in sophistication since the pathbreaking work of Binder & Price, the prevailing contexts within that literature continue to focus largely on individual clients with individual legal needs. *See, e.g.,* Lawyers as Counselors, *supra* note 13; Robert F. Cochran Jr., John M. A. DiPippa, Martha M. Peters, The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling (2d ed. 2006); Stefan H. Krieger & Richard K. Newmann, Jr., Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis (3d ed. 2007).

[20] *See, e.g.,* Lawyers as Counselors, *supra* note 13, at 282 (describing counseling as comparing identified alternatives); Cochran et al., *supra* note 19, at 116-17 (same); Krieger & Newmann, *supra* note 19, at 236-54 (same).

[21] Lawyers of course often have simply to explain the law to a client in a didactic fashion, even when the client need not use it in a complicated way. For example, a lawyer might advise a client about the requirements for a nonprofit corporation to obtain 501(c)(3) status, simply as a list of legal requirements. While this task is often more challenging than one might expect, it tends not to be the focus of the more interesting writing about the counseling process.

[22] I have argued that this kind of counseling is far more prevalent, and far more difficult, than the standard texts admit. *See* Paul R. Tremblay, *Pre-Negotiation Counseling: An Alternative Model*, 13 Clinical L. Rev. 541 (2006).

[23] *See* Binder & Price, *supra* note 12.

cussion about their implications.[24]

Two aspects of the Binder & Price approach concern us here, the two which have the most relevance to our comparisons between individual counseling and group client counseling. The first is the fundamental commitment to client-centeredness in the counseling process. The second is the elegance of the proffered structure of an effective counseling session. While both of these are quite familiar to those who teach about and engage in client counseling, they warrant a brief summary here.

*Client-Centeredness*: The Binder & Price approach to the lawyer/client interaction is expressly "client-centered," and their client-centered approach to lawyering has become the "predominant model" taught in law schools today.[25] A client-centered approach to lawyering respects an individual's autonomy, and warns against a lawyer's interference, either willingly or otherwise, with a client's full ownership of his legal matter.[26] Its basic premise is this: A lawyer must aim to assist a client to make choices and to proceed with his legal work in ways which reflect *the client's* preferences, values, goals, and commitments. It is profoundly anti-paternalist in its philosophy. It also makes a good deal of sense. A lawyer is an agent of a client, who is the principal in the relationship. Each lawyer brings to the interaction her own peculiar set of values, fears, likes and dislikes, and it is wrong, as a moral measure, for the lawyer, the professional with power and status, to make choices based upon the lawyer's preferences instead of the client's.[27]

A commitment to client-centeredness leads Binder & Price to craft counseling models imbued with *neutrality*. To understand why (and to appreciate the challenges of this stance), we should consider for a moment the expectation of a client seeking help from a lawyer on a complicated and serious legal matter. Imagine that the client has agreed to pay the lawyer a lot of money for the lawyer's services. The

[24] *See, e.g.*, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) [hereinafter Kruse, *Fortress in the Sand*].

[25] *See* Kruse, *Fortress in the Sand*, *supra* note 24, at 370.

[26] LAWYERS AS COUNSELORS, *supra* note 13, at 272-75; *see* Kruse, *Fortress in the Sand*, *supra* note 24, at 373 (noting but critiquing this analysis).

[27] This fundamental objection to lawyer control, and its respect for the preferences of the client, is a well accepted component of client-centered lawyering. For its early articulation, see BINDER & PRICE, *supra* note 12, at 147-53; Spiegel, *supra* note 6; Marcy Strauss, *Toward a Revised Model of the Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315 (1987); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 4 (1975).

client might expect that for the high prices she charges, the lawyer will offer direct and definitive advice: "My expert, considered opinion is that you should do the following . . . ." The client-centeredness approach suggests that the lawyer will seldom provide that kind of direction to her clients. Why not?

The reason why not is grounded in what lawyers assist clients to do. Suppose that a client wants to know from his lawyer what legal device will accomplish Goal X, and that only one plausible legal maneuver, Device Z, will accomplish Goal X. In that case, the lawyer should and will offer her expert advice: "We'll use Device Z." But few legal matters have such straightforward and definitive solutions. Most legal matters—and virtually all of the legal matters that are interesting and challenging—involve multiple alternative actions, uncertainties about each, assessments of levels of risk, and imperfect predictions about what some other people are likely to do in the future. A smart and wise lawyer will recognize the relevant alternatives, describe the inherent uncertainties, offer reliable predictions about other participants' likely behaviors, and assess the risk levels. But then, once the lawyer has performed her role and communicated all of that critical information to her client, only the client can choose among the available alternatives based on factors peculiarly within the client's competence.

Perhaps like most of us, many clients will want the lawyer to go further, and to make the ultimate choices for them. But, while a lawyer is well equipped to perform the role just described, she is ill-equipped to understand *what choice meets the client's needs most fully*. The lawyer may know her client really well, but the odds are that she does not know the client as well as the client knows himself. Because of the risks and uncertainties involved, the "best" decision is the one which accommodates the client's preferences, values, and position on the risk-taking versus risk-avoiding scale. It is also becoming more well-accepted that good decisionmaking is far more dependent on emotion than on reason.[28] A choice will be "right" not because of some reasoned, objective calculus, but because it meets the personal (and often unconscious[29]) needs of the person who will live with the results.

This description is almost embarrassingly oversimplified. It does not acknowledge the challenges of adhering to a client-centered approach in practice with our clients, or our students' clients.[30] It has

[28] *See* JONAH LEHRER, HOW WE DECIDE 34-42 (2008).

[29] *Id.* at 237.

[30] Kate Kruse offers one of the more elegant of the critiques of the simplified view of the neutrality principle. *See* Kruse, *Fortress in the Sand*, *supra* note 24. Others question

not addressed those settings where the above arguments lack analytical power, such as in cases involving morally unacceptable conduct[31] or where the lawyer's client lacks sufficient capacity to make informed decisions, either because of a disabling mental or emotional impairment[32] or, as some have argued, because of political oppression that limits autonomous decisionmaking.[33] But those considerations aside, the client-centered approach is fundamentally *right*, and morally coherent.[34] Any counseling model or best practice must account for that

whether it inadvertently (or otherwise) privileges dominant cultural habits while overlooking less prevalent practices and patterns of relationships. *See* Jacobs, *supra* note 24, at 361-74; Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L. J. 131 (2006).

[31] *See, e.g.*, LAWYERS AS COUNSELORS, *supra* note 13, at 391-93; Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay & Thomas L. Shaffer, *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003); Kruse, *Fortress in the Sand*, *supra* note 24, at 431. Kruse has critiqued client-centeredness for its deafness to moral issues, *see id.* at 385, but in doing so she fails to afford the model sufficient credit. While it may be true that some of the early descriptions of the model may not have been sufficiently clear, it is equally evident that deference to client preferences may only be justified when those preferences are not morally troublesome. There is nothing paternalistic about a lawyer's resisting morally unacceptable schemes, and nothing within the Binder & Price theory would suggest that a lawyer must withhold judgments on those issues. *See* Paul R. Tremblay, *Client-Centered Counseling and Moral Activism*, 30 PEPP. L. REV. 615 (2003). Kruse's worries about the actual effectiveness of a lawyer's intervention (and the use of "moral dialogues"), on the other hand, are quite on target. *See* Kruse, *Fortress in the Sand*, *supra* note 24, at 431-33.

[32] *See, e.g.*, David Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515.

[33] *See* Gary Bellow, *Steady Work*, 31 HARV. C.R.-C.L. L. REV. 297, 303 (1996) (recommending talking "seriously about purposive judgment—when and whether to intervene or to seek influence" with clients who are poor); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638 (1982) (discussing "false consciousness" as a possible justification for paternalism). This Article addresses that argument below. *See* text accompanying notes 282-307 *infra*.

[34] As we see below in our discussion of community group counseling (*see* text accompanying notes 286-88 *infra*), many critical scholars object to the "neutrality" framework emphasis within the Binder & Price model and its followers, particularly as applied to work with oppressed clients. *See, e.g.,* William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1099 [hereinafter Simon, *Dark Secret*] (scholars overstate domination of clients as an "overwhelming menace"). Those critics assert that neutrality is a false conception, because "lawyers will have to take sides" in their work with their clients. *Id.* at 1102. *See also* Kruse, *Fortress in the Sand*, *supra* note 24, at 385 (neutrality is a psychologically flawed conception); Bellow, *supra* note 33, at 301 (the "practice of law always involves exercising power"). These critics do not, however, recommend that lawyers should, as a moral and tactical commitment, dominate their clients and assert their professional superiority over the clients. Not surprisingly, the progressive critics actively reject such an attitude, and urge far greater respect for the wisdom of the non-professional clients. *See, e.g.,* Alfieri, *Practicing Community*, *supra* note 3, at 1750 ("[Progressive lawyers] *take* people's dignity. The taking deprives them of the opportunity to demonstrate—in private and

commitment. While some adherents of what has come to be known in some contexts as a "collaborative" model of client representation assert that the arguments for lawyer neutrality are overstated,[35] their arguments continue to embrace a profound respect for the interests and the preferences of the clients.[36]

*A Model or Structure*: The second ground-breaking contribution from the first Binder & Price text is its outline of a *model* for conducting a counseling session.[37] While some may quibble about the propriety of using a model for a complex interactive lawyering experience such as a client counseling session,[38] as a pedagogical tool a model is a brilliant idea. The Binder & Price model is not a recipe, and it is not intended to be slavishly followed by students.[39] But its value as an orienting device to permit students (and, of course, lawyers) to understand the insights about effective counseling, and to arrange their time with their clients in a workable way, is considerable. Here, we review briefly the basic structure of a Binder & Price counseling session, to understand its underpinning and, later, to adapt it for a lawyer's work with a group, or with constituents of a group.

The basic counseling model from Binder & Price seeks to achieve the following goals:[40] The lawyer must appreciate the client's goals and needs; the client must understand in as meaningful way as possible what the available alternatives represent, both objectively (as a matter of law and fact) and in how each alternative affects that particular client; the client must appreciate how the alternatives compare to one another, by exploring the relative advantages and disadvantages

public spheres—their competence as autonomous, self-determining agents . . . [and] denies communities a crucial element of their solidarity (organization and mobilization).")(emphasis in original). Even the critics would agree, therefore, that a counseling model, whether with individual clients, group clients, or community groups, ought to seek to minimize the inadvertent domination by the lawyer of the client. In that spirit, and without rejecting the insights of the progressive critics, this Article proceeds with a baseline embrace of the neutrality principle.

[35] *See, e.g.,* COCHRAN ET AL., *supra* note 19, at 5 (a client-centered model of representation fails to account for the needs of third parties); Kruse, *Fortress in the Sand*, *supra* note 24, at 385-95 (client-centered model is too one-dimensional).

[36] *See* COCHRAN ET AL., *supra* note 19, at 11-25 (criticizing former lawyer-dominant practices); Kruse, *Fortress in the Sand*, *supra* note 24, at 421-24 (developing a more nuanced approach to recognizing and achieving client autonomy).

[37] *See* BINDER & PRICE, *supra* note 12, at 157-87.

[38] *See, e.g.,* Jacobs, *supra* note 24, at 355-57 (critiquing the Binder & Price method for simplification of the complexity of client counseling); Linda Morton, *Teaching Creative Problem-Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1998); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 604-05 (1994); Piomelli, *supra* note 30, at 179.

[39] *See* LAWYERS AS COUNSELORS, *supra* note 13, at 12-13.

[40] *Id.* at 281-92.

of the respective options; the lawyer must organize and present the preceding discussion in a way that does not attempt to influence the client to choose a result which the lawyer would choose based upon her own preferences or needs; the lawyer must understand and account for the heuristics and biases, or "cognitive illusions,"[41] which can distort a client's "rational" decisionmaking;[42] and, finally, the lawyer must then assist the client to make a choice or a decision that fits best the client's comfort with risk, his needs, his preferences, and his "values."[43]

The Binder & Price model aims to achieve those goals by suggesting the following structure of a counseling meeting between the lawyer and her individual client.[44]

A paradigmatic meeting might follow this scheme:[45]

- The lawyer and client review the client's goals and wishes;

[41] For an overview of cognitive illusions, see Persi Diaconis & David Freedman, *The Persistence of Cognitive Illusions*, 4 BEHAV. BRAIN SCI. 317 (1981); Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 340-42 (1986).

[42] Early versions of client counseling models assumed that the lawyer and the client were economically rational actors seeking to maximize utility. In recent years both the lawyering skills community, as well as the greater legal and economic community, have come to appreciate the insights of the behavioral economists, who demonstrate how "predictably irrational" individuals tend to be in their decisionmaking. *See* LAWYERS AS COUNSELORS, *supra* note 13, at 382-91 (discussing the role of cognitive illusions in client counseling). For background in the increasingly popular literature on the topic of heuristics and biases, see, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 14 (1st ed. 1982); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); ORI BRAFMAN & ROM BRAFMAN, SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR (2009); LEHRER, *supra* note 28; LEONARD MLODINOW, THE DRUNKARD'S WALK: HOW RANDOMNESS RULES OUR LIVES (2008); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[43] It is quite common for writers addressing the counseling process to refer to the importance of the client's "values," using that term to capture the personal, internal commitments possessed by the client. *See, e.g.,* LAWYERS AS COUNSELORS, *supra* note 13, at 11-12; Ellmann, *supra* note 11, at 1164; Kruse, *Fortress in the Sand*, *supra* note 24, at 415. In my previous writing, I have resisted the use of that term, because of its implication that *moral* values are personal and idiosyncratic, and therefore essentially ungrounded outside of religious contexts. *See* Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659, 680-86 (2002) (arguing that moral values are not personal and ungrounded). As I use the tern "values" in this Article, I intend it to mean those commitments which are essentially idiosyncratic, and not as fundamental moral principles.

[44] While the following structure is, once again, not intended as a fixed orchestration and not a cookbook recipe, it does capture an elegance which makes a great deal of sense given the goals just identified.

[45] This scheme is a simplification of the model developed most recently in LAWYERS AS COUNSELORS, *supra* note 13, at 281-91. It is not inconsistent with the counseling advice contained in other texts, although other texts may rely less on models than Binder & Price and its successive iterations.

- The lawyer then *briefly* describes the available options, sufficiently so to permit the client to elect an order of discussion;
- The client then chooses which option to discuss first, second, and so forth;[46]
- The lawyer describes each option separately with great care and with elaborate detail, in an *objective* and non-normative fashion, to enable her client to understand the options and their respective levels of risk;[47]
- The lawyer and client engage in a *normative*, comparative discussion about the options, systematically and with explicit reference to advantages ("pros") and disadvantages ("cons") of each option as they apply to the client's specific circumstances;[48] and finally,
- The client, having understood the relative merits of each choice and the need to choose one, chooses one, through an active dialogue with the lawyer.

If a designer of lawyering protocols were to imagine a rational, value-maximizing actor wishing to make a deliberative decision in the most careful and thoughtful fashion, with a full appreciation for the risks involved and how those risks interact with the actor's peculiar brand of risk-taking (or risk-aversion), the designer would be hard pressed to arrive a better organizational protocol than the Binder & Price model just described.[49]

If such a scheme, with its dedication to neutrality and anti-paternalism, and its appreciation for personal risk-taking idiosyncrasy,

---

[46] The rationale for this step and that just preceding it is to minimize the lawyer's inadvertent (or advertent) skewing the decisionmaking process by choosing the order of topic discussion, signally thereby the lawyer's value judgments about the options. *See id.* at 309.

[47] As will remain apparent as this Article proceeds, the most important quality, and the most challenging factor, within a counseling meeting of this type concerns how the client will manage the relative risks involved in the available choices. In the paradigmatic circumstance, each alternative offers to the client some chance of good and some chance of bad, with the levels of risk, of good, and of bad different within each choice. The client's goal is not simply to choose the option that delivers the highest level of the good; he must instead grapple with his risk aversion sentiments to decide the types of gambles he is willing to take. For a discussion of this element of counseling, see, e.g., Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 379 (1997); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 655 (1997) [hereinafter Langevoort, *Epistemology*] (lawyers are motivated to overstate legal risk).

[48] The counseling texts often note the value of a chart to accomplish the systematic assessment of the competing alternatives. *See* LAWYERS AS COUNSELORS, *supra* note 13, at 236, 320; COCHRAN ET AL., *supra* note 19, at 167-68.

[49] The commentators tend to agree with this assessment. *See* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 179-83 (1992) [hereinafter THE MACCRATE REPORT]; Dinerstein, *supra* note 24, at 504 (noting "the extraordinary influence of the model within clinical education circles").

works for an individual, value-maximizing actor, how, if at all, should it be adapted to fit the context of a member, representative, or constituent of an organization or group? That question serves as the basis for the remainder of this Article. To begin the inquiry, we must establish an understanding of the term "client group."

## II. "Group" Clients

We may start by recognizing that the conception of a "group" client easily separates into two distinct possibilities: (1) a group client might refer to a collection of clients whom the lawyer represents in the same matter—otherwise known in many circles as "joint clients";[50] and (2) a collection of individuals (or entities[51]) who understand themselves to constitute a single organization—in other words, an entity, as commonly understood by Model Rule 1.13.[52] The lawyer's responsibilities should be substantially different depending upon which kind of group the lawyer represents. Every instance of "group" representation falls into one of those two categories.

It might be the case that one's initial understanding of the task of counseling "group clients" would implicate only the former understanding, and not the latter, since, of course, an organizational client is a single client just as any individual person would be. Indeed, it is hard to consider a lawyer representing, say, Martha's Bakery, Inc. as representing a "group" client. In fact, for purposes of thinking about the lawyer's role as a counselor, the precise opposite understanding applies. A lawyer working with multiple individual clients is not counseling a "group client" at all, for the purposes of interest to this Article. A lawyer working with an entity, by contrast, is working with a "group client," almost all of the time. Given our ultimate goal of understanding a lawyer's responsibility in representing community groups, this contention is especially true.

The next section examines the differences in the counseling process between the two kinds of collective clients, but before we reach that examination we should add a bit of texture to this definitional introduction.

Imagine, then, a series of lawyer/client interactions, in the following progression:

---

[50] For a discussion of joint client representation, see, e.g., Restatement (Third) of the Law Governing Lawyers §§ 128-130 (2002) [hereinafter Restatement]; *Multiple Representation*, Laws. Man. on Prof. Conduct (ABA/BNA) 51:301-30 (2009).

[51] An entity may be a collection of entities. *See, e.g.,* Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) (law firm represented the American Petroleum Institute, a consortium of energy companies).

[52] Model Rules of Professional Conduct, R. 1.13 (2009) [hereinafter "Model Rules"].

1. Ellen, a lawyer, represents Fred Quinn as a plaintiff in civil action involving an automobile accident. Ellen has one individual client, as we all would agree.

2. Ellen represents Fred and Karen Quinn, a married couple about to purchase a condominium, for purposes of the couple's real estate closing. Ellen now has two individual clients, to each of whom she owes full fidelity and her other lawyer-generated duties. There is a potential conflict of interest between Fred and Karen which Ellen must recognize and, possibly, address.[53] We would likely not understand Ellen as representing the "group" client which this couple represents, especially since each client has his or her separate identity and is entitled to his or her separate allegiance from Ellen.[54]

3. Ellen represents Sullivan, Carchidi, and DiPasquale, defending each against first-degree murder charges filed against all three. Even more clearly than in the previous example, Ellen has three separate clients here, with very substantial potential (if not actual) conflicts of interest.[55] To refer to the three defendant-clients as a "group" client serves no purpose whatsoever, as Ellen must respect the rights and interests of each equally (subject to some knowing waivers by the clients[56]).

4. Ellen represents Fred and Karen Quinn, along with Evangeline Olson and Alan McMorrow, all four of whom wish to start and in-

---

[53] A lawyer may represent multiple individual clients in the same matter as long as no disqualifying conflict of interest exists. MODEL RULES, *supra* note 52, at R. 1.7. If the multiple clients face potential conflicts that might interfere with the attorney's professional judgment, the lawyer may still represent the clients, but only after obtaining informed consent. *Id.* at R. 1.7(b). The Comments to Rule 1.7 imply that a lawyer must obtain informed consent in *every* instance of multiple representation, to insure that the clients understand the benefits of separate representation. *Id.* at Cmt. [29]. Other authorities seemingly disagree. *See, e.g.,* RESTATEMENT, *supra* note 50, at § 130, Cmt. *c*, Illus. 1 (advising an informed consent discussion only in matters where a plausible potential conflict exists).

[54] The real estate closing example is a useful one to highlight the subtle distinction between joint and entity representation. While the statement in the text is true, that each separate client (here, Fred and Karen) is entitled to seek the assistance of his or her own lawyer, it is conceptually unclear what a separate lawyer would accomplish in this example, since the closing is not a divisible event, and the parties' interests are fully aligned. (Indeed, if the parties develop a difference of opinion about a term in the closing, they must come to some consensus or the transaction, with the couple as buyers, will fail.) For this reason, there is some logic in deeming the couple as an entity. *Cf.* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 965-66 (1987) ("organic communities [such as a husband and wife dyad] . . . are prior in life and culture to individuals").

[55] *See* Cuyler v. Sullivan, 446 U.S. 335 (1980) (possible conflict of interest among defendants Sullivan, Carchidi, and DiPasquale which, if proven, would violate the defendants' rights under the Sixth Amendment).

[56] MODEL RULES, *supra* note 52, at R. 1.7. Most authorities discourage joint representation of criminal defendants in a single prosecution, even if the prospective clients so choose. *See Multiple Representation*, Laws. Man. on Prof. Conduct (ABA/BNA) 51:301-30 (2009).

corporate a new small on-line business, to be known as Eastern Valley Texts, Inc. Fred and Karen will provide financing and are looking for an equity share as an investment; Evangeline will provide the technical expertise and will create the business's systems, after investing a little bit of capital; and Alan will operate the business but will not invest any initial capital. Ellen now has four clients, but surely not a "group client." Indeed, because of the seriously differing interests and varying types of investment of the four principals of the business, Ellen must recognize and massage the possible conflicts of interest among them. Most legal ethics authorities would conclude that Ellen may proceed to represent the four clients in this setting, with appropriate waivers and consents.[57]

5. Ellen now represents Eastern Valley Texts, Inc., the Subchapter S corporation she helped create for Fred, Karen, Evangeline and Alan, each of whom is now a shareholder and one of whom (Alan) is now an employee. Ellen now has just one client—the entity—which we can consider a "group client," because the entity consists of its several constituents and Ellen must attend to the constituents' interests as reflected in the organizational bylaws and similar documents. Of all of the examples we have seen thus far, this example comes closest to capturing the essence of a group client, instead of some version of joint representation.[58]

6. One final example: Ellen represents the Brooksby Hill Tenants Association, an unincorporated association of residents living within a public housing complex in her city. The group meets regularly and wants advice about tenant rights and assistance with strategies to obtain benefits from the housing authority management. As we examine more fully below, Ellen as a lawyer *may* represent an unincorporated association, and in doing so she represents it as an entity, subject to Rule 1.13.[59] Ellen could, given the fact that this group is not formally organized, represent a number of tenants sep-

[57] *See* Jesse v. Danforth, 485 N.W.2d 63 (Wis. 1992) (joint representation permitted but after entity formed, constituents lose client status retroactively); Manion v. Nagin, 394 F.3d 1062, 1069 (8th Cir. 2005) (limiting the *Danforth* doctrine). For a discussion of both cases, see D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313 (2006). *See also* RESTATEMENT, *supra* note 50, at § 130 (disagreeing with the *Jesse* retroactivity principle but allowing the joint representation of constituents).

[58] Note here that Ellen also has four *former* clients, now that she represents the entity and does not represent the constituents of the entity. The ethical authorities of course advise Ellen to make that distinction clear to the now-constituents. *See* MODEL RULES, *supra* note 52, at R. 1.13(f). *But see* Jesse v. Danforth, *supra* note 57 (constituents retroactively deemed non-clients, so no former client implications).

[59] *Id.* at R. 1.13, cmt. 1; RESTATEMENT, *supra* note 50, at § 130; 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 17.3 (3d ed. 2001 & Supp. 2009). Whether an unincorporated association constitutes an entity or a collection of individuals is a complicated question, which we confront later. *See* text accompanying notes 115-25 *infra*.

arately but jointly (like in most of the earlier examples above), but her responsibilities would change, especially in her grappling with potential conflicts of interest.

The taxonomy we have just observed demonstrates that the concept of representing a "group" can only be understood in any meaningful way as representing an entity, rather than representing a collection of individuals. The reference has some usefulness in referring to joint representation as well, but less elegantly so. Nevertheless, the following discussion will necessarily address both types of multiple representation.

## III. Counseling Group Clients

With the preceding definitional background in place, and with a reminder of the "baseline" counseling model emerging from the Binder & Price sources as an appropriate benchmark, this section will now consider the counseling responsibilities of a lawyer working with three kinds of group clients: (1) joint clients (even if they may not properly qualify as a "group"); (2) well-structured entity clients; and (3) loosely-structured entity clients. After having done so, Part IV will extrapolate from what we learn here to uncover the best practices considerations for working with community groups.

### *A. Counseling Joint Clients*

As we have seen immediately above, a lawyer representing joint clients really has multiple *individual* clients. Given our plan to use the baseline Binder & Price individual-client model as a benchmark for comparison, there may not be very much of interest to consider when we explore how a lawyer ought to work with her multiple individual clients. Since the fact of joint representation does not deprive the respective individual clients of any rights within the lawyering relationship relevant to our purposes,[60] one might imagine that any counseling of the clients, whether together in one room or separately, would follow the default Binder & Price model. In other words, nothing in the joint representation itself requires the lawyer to alter the goals or the techniques of individual client counseling.

Understanding that, we ought to address here briefly the challenges faced by a lawyer when representing multiple individual clients

[60] Joint clients do sacrifice some important confidentiality rights that non-joint clients own. With rare exceptions, a client jointly represented along with one or more co-clients cannot expect that any secrets he discloses to the lawyer will remain confidential as to the remaining co-clients. *See* Model Rules, *supra* note 52, at R. 1.7, cmt. 31; Restatement, *supra* note 50, at §60, Cmt. *l*. That limitation on the attorney-client relationship does not affect the lawyer's counseling responsibilities, however.

with separable and potentially differing interests, especially since, as we shall see later, in some community group settings the lawyer might need to treat the collectivity as a form of joint representation.[61] The discussion here will be somewhat superficial, however, because the issues covered here are the subject of discussion in the conventional legal ethics literature.[62]

The most apt subject for our consideration here is the lawyer's preliminary but absolutely essential counseling responsibility—to advise her clients about the potential conflicts and obtain their informed consent to the joint representation.[63] This task is a paradigmatic Binder & Price counseling opportunity, with a finite set of alternatives (retain separate counsel, or accept joint representation) of which each client must choose only one, and not deciding (that is to say, being too uncertain or torn to arrive at a decision) means deciding on the "default" or status quo option, which here would mean separate representation.[64] A lawyer's counseling meeting would seemingly look like the meeting described above, with the lawyer being neutral about which choice the client makes, and orchestrating the conversation to ensure a full descriptive component before an evaluative or normative discussion.[65]

There are two distinctive issues arising in a lawyer's effort to discern a client's informed consent to joint representation, however. Each warrants brief consideration here before we move on. The first issue has to do with whether the ethical obligations of the lawyer require her to meet separately with each of her potential clients for this informed consent talk, or whether the counseling may occur more efficiently by meeting with the potential clients together. The latter is both far more efficient and, one guesses, standard practice among lawyers.[66] Without probing the question in great depth here (and the topic perhaps warrants its own separate article[67]), we can at least ten-

[61] *See* text accompanying notes 77-80 *infra*.

[62] *See, e.g., Multiple Representation*, supra note 56.

[63] *See* MODEL RULES, *supra* note 52, at R. 1.7(c) and Cmts. 29 through 33.

[64] Because the lawyer must obtain an affirmative act from her client (a formal waiver of the potential conflicts) in order to proceed with the joint representation, the default arrangement is separate representation (or no representation).

[65] *See* text accompanying notes 44-49 *supra*.

[66] As my colleague Judy McMorrow notes, in practice this informed consent interaction often occurs by means of a letter, with no meeting about it at all. Conversation with Professor Judith McMorrow, February 26, 2010.

[67] The topic receives attention in several published sources, usually in the context of estate planning, a practice field which may trigger its own special conflicts concerns. *See, e.g.,* AM. COLL. OF TRUST & ESTATE COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 32 (4th ed. 2006) (known as the ACTEC Commentaries) ("A lawyer may wish to consider meeting with prospective clients separately, which would give each of them an opportunity to be more candid and, perhaps, reveal potentially

tatively conclude that neither prevailing legal ethics doctrine nor strategic wisdom would require separate meetings with each potential co-client. While some worry must exist that some subtle (or not-so-subtle) peer pressure could affect the voluntariness of any one potential client's decision to waive potential conflicts if made within a group meeting, that worry diminishes somewhat when one realizes that the result of the potential client's deliberation cannot help but be pretty apparent to the other potential clients, who will know with certainty whether the joint representation will go forward or not, and whether the others have waived conflicts or not.[68]

The second concern relates to, and actually undercuts the previous response to, the first. That concern relates to the lawyer's confidentiality obligations with her co-clients. It is itself doubly layered. Let us address the most obvious confidentiality layer first. The Model Rules,[69] and the doctrine surrounding the Model Rules,[70] establish that co-representation will normally include the understanding that there will be no secrets within the lawyer/client collectivity, and among the co-clients. This understanding emerges from the established doctrine within the attorney-client privilege[71] but also from the lawyer's obligations to each client under Rule 1.4 to keep her clients reasonably informed about developments material to the representation.[72] If the lawyer's counseling role were simply to announce to her clients that this concession is a necessary and inevitable by-product of joint representation (and therefore likely a disadvantage, a "con," to

serious conflicts of interest or objectives that would not otherwise be disclosed."); Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 23 (1994) ("[I]f a multiple representation is being considered separate interviews should be held with each client, more than once if necessary. Separate interviews can reveal divergences in the clients' respective assumptions and purposes that otherwise would be masked by polite conversation.").

[68] The explanation in the text is actually rather oversimplified, which again suggests the need for a separate treatment of this issue beyond what we may address here. If the lawyer needs to obtain informed consent to co-representation from *two* potential clients, then the reasoning in the text applies perfectly—each person will know which way the other has decided even if the counseling meetings are held separately and in private. But if the group of potential co-clients is three or more, that conclusion does not follow. None of the three will know which of the other two did not agree to joint representation if the lawyer does not obtain unanimity to the waivers.

[69] MODEL RULES, *supra* note 52, at R. 1.7 cmt. 31.

[70] *See, e.g.*, RESTATEMENT, *supra* note 50, at §60; RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE §1.6-9, 262-64 (2008-09).

[71] *See, e.g.,* RESTATEMENT, *supra* note 50, at §75, Cmt. *d*; State v. Cascone, 487 A.2d 186, 189 (Conn. 1985); Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991); Ashcraft & Gerel v. Shaw, 728 A.2d 798 (Md. App. 1999).

[72] MODEL RULES, *supra* note 52, at R. 1.4; A v. B. v. Hill Wallack, 726 A.2d 924 (N.J. 1999)(concluding that Rule 1.4 duties must be enforced even over objection of a co-client, because complaining co-client had warnings about shared secrets).

the idea of a joint endeavor), it would be of some interest but little more than that. In fact, however, the concession is neither inevitable nor necessary. It is a *choice* to be made by each prospective client.[73] While no doubt awkward in practice, the lawyer and her co-clients possess the right according to the substantive law of lawyering to opt not to share with one another all confidential information passing through the lawyer. Such an agreement will preserve the privilege waiver implications in the case of a later dispute between some co-clients,[74] just as it contractually limits the lawyer's obligations under Rule 1.4 and permits the lawyer to withhold otherwise material information from some of her clients.[75]

For our purposes, this insight complicates the lawyer's counseling strategy, and might influence whether she may perform her disclosure duties to the group as a whole. A competent informed consent discussion must address this issue with each affected prospective client. Each prospective client must have the lawyer's wise judgment about whether that client has information which ought not be shared with the others.[76] The lawyer would be a more effective counselor to each prospective client if she could have that discussion outside of the earshot of the other potential co-client.

That concern is what was described a moment ago as the first of the two confidentiality layers. The second layer becomes apparent now, given our assessment of the lawyer's efforts to obtain intelligent, informed consent to the confidentiality waiver. While the lawyer is negotiating the contours of her relationships with the prospective clients (and potential co-clients), *those preliminary conversations* have their own confidentiality implications which the lawyer and her prospective clients must appreciate. Even if each prospective client opted not to retain the lawyer after the lawyer has explored the possible conflicts waivers, the discussions about whether to retain the lawyer are fully covered by the confidentiality protections of Rule 1.6.[77] Therefore, were the lawyer, in an explicit effort to be the best counselor to each person about whether that person would choose to waive

[73] MODEL RULES, *supra* note 50, at R. 1.7, Cmt. 31; ROTUNDA & DZIENKOWSKI, *supra* note 70, at § 1.6-9.

[74] RESTATEMENT, *supra* note 50, at §75, Cmt. *d*.

[75] *See* MODEL RULES, *supra* note 52, at R. 1.7, Cmt. 31.

[76] The example used in the legal ethics literature—the question of trade secrets—cleverly eludes this worry. *See* RESTATEMENT, *supra* note 50, at §60, Cmt. *l*; MODEL RULES, *supra* note 52, at R. 1.7, Cmt. 31. One can easily imagine a lawyer working with two aligned but also competitor companies, where each would agree in front of the other that the lawyer will not reveal the respective client's trade secrets to the other. The fact of some valuable but extremely confidential information is not itself something to be kept from the other co-client.

[77] MODEL RULES, *supra* note 52, at R. 1.18(b).

confidentiality and to waive any other potential conflicts, to decide to meet separately with each person, all of her successive conversations would be imbued with the cloak of secrecy. The resulting constraint might then impair the lawyer's later representation of any client who chose to stay with the lawyer.[78] More importantly, that reality might impair the lawyer's effectiveness in the next discussion with the next prospective co-client about whether to waive confidentiality and any possible conflicts of interest.[79]

Given these two layers of concern, the lawyer might conclude that her most prudent posture is to meet with her prospective co-clients together, and not alone, to counsel them as best she can while remaining fully generic in her description of the risks involved. For example, recall Ellen, who represents Fred and Karen Quinn, along with Evangeline Olson and Alan McMorrow, all four of whom wish to start and incorporate a new small on-line business, to be known as Eastern Valley Texts, Inc.[80] A sample of how Ellen might describe her mission to the four individuals might proceed something like this:

> I would love to represent the four of you on this project. In so many ways, it makes sense for you four as a group to choose one lawyer—me, or someone else—to assist you to decide whether to create an organization and, if so, what kind of structure to use. But before we talk about your retaining me, though, I have a very im-

[78] It is not at all inconceivable that the co-clients would decline joint representation after the lawyer's informed consent discussion (any one of them has a veto, of course), and that one of the group would choose the lawyer to serve as his sole counsel thereafter. *See, e.g.*, Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. L. ETHICS 541, 554-55 (1997). The concern in the text addresses whether in-depth, separate, serial meetings with each prospective client might impair the lawyer's ability to accept the single client representation.

[79] This worry is easily imagined. Say that our lawyer meets with prospective client #1 (within a group of three), and explores in great depth whether he ought to consent to the joint representation. The lawyer meets with him alone in order to be more useful to him in making this difficult choice, so he is not constrained by the presence of the other two in thinking through his worries. The special consideration that the lawyer offers to this individual increases the chances that she would learn some valuable information that, even if he does not see it as a worry as to his other two potential co-clients, might turn out to have some important implication for Client #2 when the lawyer meets with him. Having heard the information from Client #1, and *not having obtained any informed waivers yet* from any of them (indeed, that is what she is working on), the lawyer may be hobbled in her ability to assist Client #2 in his deliberation, because she knows information which might affect Client #2's thinking, but she cannot share that information with Client #2 until she has permission from Client #1, permission she cannot obtain until she has completed her serial meetings. In this respect the lawyer may find herself in the dilemma explored often among estate planning lawyers concerning common representation of husbands and wives. *See, e.g.*, Shaffer, *supra* note 54 (describing a lawyer representing both husband and wife who learns a damaging fact from the husband who wishes to keep that fact from the wife); NY State Bar Ethics Op. 55 (similar facts; concluding that the lawyer's confidentiality duty to the husband outweighs her duty to inform the wife).

[80] *See* text accompanying note 57 *supra*.

portant job to do.

I need to explain to you a couple of critical things about what it means if I, as a single lawyer, represented you, as four separate individuals, on this common matter. I need to help you understand that you have a choice of each hiring your own lawyer to best protect your own rights. There may be good reasons to consider that option of separate lawyers, but there also may be important reasons why you would not wish to do that. The reason I raise that possibility is that, as I will explain, you have interests among you in this business deal that are not identical. You come to the project with diverse kinds of investments and different roles to play. We'll have to talk about those investments and roles, as you decide whether you want to have one lawyer to represent all of you even though your interests are not perfectly aligned. I believe we'll conclude that it's entirely proper for you to choose to have one lawyer for all of you, if that's what you want.

I also need to explain to you what it means for me to have four joint clients in terms of the information you give me, and how much of that I will share with the others in the group. By sharing a lawyer you will get less of a complete confidentiality promise from me—but just as to one another, and not as to anyone else—compared to your having your own individual lawyers. My job is to make sure you understand how that will work, and I'll explain it more fully in a minute.

And before we actually start talking about this in more detail, I need to explain one more introductory matter to you. My intention is not to meet with each of you separately as we decide whether you want to go with one lawyer or go with four. Until we decide what my role is, and whom I will represent, I can't start to interview each of you separately, because you might tell me something that affects my separate conversation with one of the others. You are entirely free to be as open and honest among each other as you wish in this room, and nothing you say here leaves this room, unless I start to hear about some immediate plan by one of you to go out and hurt someone real bad—and of course that's not going to happen.[81] So we'll work as a group while we decide whether you want a lawyer as a group. Does that make sense to you?

This conversation captures the lawyer's responsibility, at least preliminarily, for seeking informed consent to multiple representa-

[81] Note how the lawyer promises complete confidentiality, but acknowledges the existence of exceptions. This issue is a fascinating one for students and lawyers alike. For a discussion of the issue, see, e.g., LAWYERS AS COUNSELORS, *supra* note 13, at 106-07; Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579 (2003); Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 29 CATH. U. L. REV. 441 (1990).

tion.[82] If some representation of community groups involves not entity representation but joint representation, as seems quite likely,[83] the lawyer working with the group must engage in some version of this conversation with those members of the community group who the lawyer understands will serve as formal clients.

### *B. Counseling Well-Structured Group Clients*

As we noted above, the concept of joint (but still individualized[84]) representation might qualify as the representation of a group, but more sensibly the latter would invoke the idea of representing the group *qua* group. While a collectivity may have an identity that makes the entity theory a coherent possibility, it of course does not have an intrinsic means of expressing itself. The lawyer representing the collectivity must discern how to gauge the intentions of the client in order to accomplish her purposes.[85]

Many group clients will have explicit and rigorous schemes in place for expressing the desires of the organization, and for making and implementing decisions. This subsection examines the responsibilities of a lawyer when working with that very typical type of client—typical, at least, outside of the community group context.

The question before us in this context might be summarized as follows: When a lawyer counsels a legitimate, authorized constituent

---

[82] *See* ROTUNDA & DZIENKOWSKI, *supra* note 70, at § 1.7-2(d) (discussing the requirements for proper joint representation).

[83] Some examples from the literature on community lawyering show groups which appear to be loosely combined collections of individual clients. *See, e.g.,* Bennett, *Embracing the Ill-Structured Problem*, *supra* note 9, at 58; Piomelli, *supra* note 1, at 401-02 (environmental justice story in which a lawyer represents three community members who partner with other residents as the story later develops). Indeed, Michael Diamond and Aaron O'Toole argue that the fluidity of community groups may be essential to their character, so that imposing the constraints of Rule 1.13's bureaucratic sensibility is harmful to the lawyer's work with such groups. *See* Diamond & O'Toole, *supra* note 2, at 523-24.

[84] The legal ethics literature tends to refer to the joint representation as "aggregate," to distinguish that work from the conception adopted by the drafters of the Model Rules, which the literature refers to as the "entity" theory. *See* HAZARD & HODES, *supra* note 59, at § 17-3.

[85] This counseling question is a variation of the central ethical challenge faced by any corporate counsel—how to represent the entity through its "duly authorized constituents." While that question understandably has received considerable scholarly attention, scholars continue to struggle with the concept, and few if any address the quality of the actual interactions between the lawyer and her client's agents. For a sampling of the literature, see, e.g., Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466 (1989); Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 687-95 (1994); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. REV. 57 (2003); Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687 (1993).

of an entity, do the lawyer's responsibilities differ in any way from her working with an individual client (like, again, a woman in the middle of a contested divorce)? The answer to that question appears to be yes. The lawyer's role does differ, in a subtle but possibly important way. Given the goals of effective client counseling identified above,[86] the entity's agent is not necessarily entitled to the same level of deference from the lawyer as the individual client in the divorce matter. This conclusion will be especially apparent in circumstances of internal organizational disagreement, of course, but it need not be that narrow. It will hold true even in conventional counseling interactions.

Since any corporation, whatever its size, could qualify as a well-structured group client, we could use General Electric or Harvard University as the focus for our discussion, for the principles we discern here would apply equally to that large corporate setting. Instead, let us imagine an energetic, high-functioning community development corporation as our example. Consider the Montrose Community Development Corporation (MCDC), a fictional neighborhood organization in Massachusetts.[87] Imagine that MCDC has a five-member board of directors, an executive director, several employees with defined roles (Director of Asset Building Programs, Director of Finance, Director of Community Organizing, etc.), and the usual collection of interns and volunteers which populate a community development corporation. Imagine that the MCDC has retained a lawyer, Dan Shaikh, to represent it in a sale of an affordable condominium to a first-time home buyer. That representation involves some regular counseling about legal issues that arise in the course of this real estate transaction. Assume for our purposes that Dan's primary contact for his legal work is Mercedes Rodriguez, the Director of Asset Building Programs at MCDC.

Mercedes, of course, is not Dan's client; MCDC is Dan's client.[88] The first question for our purposes is whether Dan may *treat* Mercedes as his client for all counseling purposes—so that, essentially, counseling MCDC would be exactly the same as counseling one of Dan's individual clients, as Dan was taught in his law school clinic, applying the Binder & Price model of careful counseling. The answer to that question will be "pretty much so, but not perfectly so." Of course, Dan must be certain that Mercedes has authority to speak for MCDC, and in his usual day-to-day work Dan would be sufficiently confident

[86] *See* text accompanying notes 40-43 *supra*.

[87] MCDC has appeared in the past. *See* Paul R. Tremblay, *Shadow Lawyering: Non-lawyer Practice Within Law Firms*, 85 IND. L.J. 653, 662-63 (2009).

[88] *See* HAZARD & HODES, *supra* note 59, at § 17.3.

that he has such actual or apparent authority.[89]

Assuming that Dan has adequate actual authority to work with Mercedes in this transaction, let us focus on a more pointed counseling moment. Assume the following development:

> The real estate closing has been scheduled, and the buyers, a young Guatemalan couple, have given a $3,000 deposit when they signed the purchase and sale agreement (known as a P&S[90]). That P&S says that the buyers will forfeit the deposit (and MCDC will get to retain it) if the buyers do not go through with the sale on the appointed closing date, subject to some reasonable exceptions. The buyers have encountered some difficulty with the bank which they expected would provide their mortgage, and they need a 30-day extension of the closing date. They may or may not have a legal right to that extension; much turns on the content of some informal conversations between MCDC staff and the buyers about the flexibility of the closing date.
>
> Dan's role is to counsel Mercedes about whether to enforce the language of the P&S and retain the $3,000 deposit. This is a typical legal counseling matter—there is some chance that the buyers would win any lawsuit regarding the deposit, but some chance that the P&S's literal provisions would prevail in the end. There is some uncertainty about how quickly MCDC could locate a replacement buyer, so permitting the extension would reduce that risk. Dan's client would have the legal right to allow the extension, or to refuse the extension and claim the deposit, subject to the buyers' possible lawsuit to obtain its return.

The conventional counseling literature would offer Dan a sensi-

---

[89] In fact, the aside in the text about Dan's clarity about Mercedes's authority masks a more slippery issue in practice, one that we may only note here and move on. Even if Dan's retainer agreement were signed by the Executive Director of MCDC (and that formality is not necessary under accepted corporate and agency law; *see, e.g.*, Searle v. Cayuga Medical Center at Ithaca, 813 N.Y.S.2d 552 (hospital may be liable to patient for medical malpractice due to apparent authority); Town Center Shopping Center, LLC v. Premier Mortg. Funding, Inc. 148 P.3d 565 (Kan.App. 2006) (corporate tenant responsible for expenses due to landlord under lease agreement resulting from employee's signature of a lease)), Dan will likely work pretty exclusively with Mercedes and others with less authority in the organization during Dan's day-to-day work with her. Whether Mercedes has *actual* (as opposed to apparent) authority for the multitude of decisions she will make with Dan is at least uncertain. As long as he possesses apparent authority, though, Dan breaches no professional duties, which makes a lot of pragmatic sense. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.03 (2009):

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

*See also* Shimko v. Guenther, 505 F.3d 987, 991 (9th Cir. 2007) (attorney should have known that limited partner was not general partner; claim for apparent authority denied).

[90] *See* Unif. Vendor and Purchaser Risk Act, 14 U.L.A. 689 (2005) (governing purchase and sales agreements for real estate and adopted in several states).

ble structure for assisting Mercedes to make this decision. It is a relatively uncluttered counseling matter—there are two discrete options (grant the extension, or refuse to grant the extension), and both legal and non-legal considerations affect the likely outcomes of each choice. If this were Mercedes's choice as an individual, Dan would engage her with a goal of educating her about the nature of each option, discerning her interests and risk-aversion, and guiding her to make the best decision possible, so that in the end she has a minimum of regret about the decision she chooses. Does his counseling of Mercedes as a constituent change any of that?

It might. The reason it might has to do with the assessment of risk, and the appreciation of risk aversion. Virtually everything within the counseling process connects to decisions under uncertainty, and the appreciation for risk.[91] Of course, as we noted earlier,[92] some counseling is straightforward didactic narrative—"You must file this paper in that office by the following deadline." But that kind of lawyer/client interaction is neither interesting nor challenging. The interesting and challenging counseling involves *making choices*, and the choices involve predictions, uncertainty, and risk, and the decisionmaker's comfort with the uncertainty and risk. The client-centered philosophy of counseling assigns to the lawyer the role of ascertaining and systematizing the predictions and the uncertainties, and assigns to the client the role of taking, or not taking, the risks.[93] The reason the client must assume the latter role is that it is the client's risk-aversion that matters. The lawyer might have different risk-aversion qualities, and it is quite easy, and natural, for the lawyer to assume (even in utmost good faith) that the risk aversion he feels must be similar to what his client feels. The client-centered model of counseling insists that the lawyer not make that mistake. It expressly divides the role of description from the role of evaluation.[94]

When Dan and Mercedes meet, Dan will describe the risks and

[91] Client decisionmaking requires an appreciation for risk-taking, *see* G. NICHOLAS HERMAN, JEAN M. CARY & JOSEPH E. KENNEDY, LEGAL COUNSELING AND NEGOTIATING: A PRACTICAL APPROACH 157-63 (2d ed. 2009) (discussing risk aversion in the counseling process); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1253 (1938) (noting the desire for certainty in law but its elusiveness), and for psychological comfort in face of uncertainty, *see* Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 559 ("the psychological ramifications of proximity"); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002).

[92] *See* text accompanying note 21 *supra*.

[93] *See, e.g.* LAWYERS AS COUNSELORS, *supra* note 13, at 7-8. For an early recognition of this insight, see Spiegel, *supra* note 6, at 73-76.

[94] *See* text accompanying notes 26-28 *supra*.

uncertainties, and his training has taught him to defer to Mercedes in evaluating whether the risks are worth taking. But, just as Dan's risk aversion may be different from Mercedes's, Mercedes's risk aversion may be different from others within the MCDC. While Dan must assume that Mercedes speaks faithfully for the MCDC on this important risk-focused consideration, and defer to her in the fashion that the client-centered model would suggest, the quality of his deference ought to be different, and less, than if Mercedes were the client herself. Let us explore why this is so.

Dan recognizes that MCDC has appointed Mercedes to serve as its agent for purposes of this legal consultation. The authority structure within MCDC has delegated to Mercedes the responsibility for making choices like this, with knowledge of her quality of judgment and her personality. If MCDC possesses an unfettered right, just like Dan's individual clients, to choose to take high-risk or low-risk actions in the course of its business (or to act as rashly as the client wishes to act within the bounds of the law[95]), Dan will then accept Mercedes's assessment of the risks and her preferences during the counseling process. (In fact, MCDC may *not* have the same license to make rash decisions as an individual client would, because it qualifies as a community group, and that designation will serve as a constraint on the client's discretion as we shall see later.[96])

But he may do so in a fashion somewhat less neutral than the conventional counseling models would prescribe for individual clients. The importance of neutrality, of course, is to protect against Dan's "imposing"[97] upon his presumably less sophisticated clients his risk-

[95] The rich literature exploring the role responsibilities of lawyers (and other professionals) working with impaired clients has developed an appreciation for the client's autonomy right to make foolish, if lawful, choices. *See, e.g.*, Luban, *supra* note 32, at 462-65; Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1844 (1992) (questioning whether guardianship laws ought to interfere with the right to make unwise decisions); Robert Roca & Thomas Finucane, *Physicians and Guardianship: A Brief Commentary*, 7 MD. J. CONTEMP. LEGAL ISSUES 239, 242 (1996) (guardianship not appropriate for an individual who is "simply an eccentric person making unusual, unpopular, or unwise choices").

[96] *See* text accompanying note 172 *infra*.

[97] The worry identified in the literature on the proper engagement between lawyer and client is that the lawyer, as expert with power, will dominate his client. For an early expression of this worry, see Wasserstrom, *supra* note 27, at 16-18; for more recent discussion, see, for example, Anthony V. Alfieri, *(Un)Covering Identity*, 121 HARV. L. REV 805, 832 (2007) [hereinafter Alfieri, *(Un)Covering Identity*] (criticizing the "domineering" traits within regnant lawyering); Piomelli, *supra* note 1, at 454-55 (observing the critical trends counter to the lawyer-dominant model). That worry is similar to, but analytically distinct from, a pervasive concern within professionalism studies about "imposing values." The proscription on imposing value judgments is extremely common. *See, e.g.*, Dinerstein, *supra* note 24, at 156 (criticizing a scholar's encouragement of lawyers' "imposing values"

taking valence, which from an ethical standpoint would be a regrettable result. That fear exists with Mercedes, of course. But Dan owes MCDC a special responsibility to make sure that its important decisions are made intentionally, with a full appreciation by the organization of the risks involved.[98] While Mercedes is indeed MCDC's agent, and MCDC has (either actually or implicitly) delegated to her the power to make this decision, Dan cannot simply assume that the delegation process is a perfect one.[99] Dan has, in essence, an epistemology problem. He wonders about the match between Mercedes's risk tolerance and MCDC's risk tolerance in a way that he need not with an individual client.

We now see how Dan's conversation with Mercedes might change as a result of her being a constituent. Dan has the responsibility to attend to the *accuracy* of Mercedes's judgments about the corporate risk-aversion. He may inquire with Mercedes not just about how well she appreciates the risks, but whether her assessments about taking the risks are reflective of those with whom, and for whom, she works. This is especially true when (and this will be the case most of the time) the risks implicate the good will, the resources, or the mission of the organization.

Imagine, then, a conversation with Mercedes, following upon a version of the prior one above:

> Let me summarize where we are right now. You've got a great understanding of and appreciation for the choices before us, and the risks that each entails. And I'm hearing from you pretty clearly that you prefer to take the more aggressive stance, and cancel the closing and keep the buyers' deposit. As I've told you, that's an entirely

on clients); Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 866 (2002) ("My students often express concern with lawyers 'imposing their values' on clients."). It is also uniform, in that virtually no observer argues that teachers or professionals *should* impose their values upon their students or clients. But, as I described above, the concept of value imposition is not entirely a coherent one, implying, as it does, that value judgments are somehow subjective and personal. *See* Tremblay, *supra* note 22, at 680-86; text accompanying note 27 *supra*. For our present purposes, the imposition worry is more legitimate, because, unlike questions of moral sensibility, willingness to incur risk is essentially subjective, and the lawyer has no argument that his risk aversion scale ought to be shared by his clients.

[98] As Kate Kruse writes, "Lawyers in the corporate context can serve a similar function of checking the sometimes unrealistic optimism that tends to pervade business and corporate culture by raising pragmatic concerns based on measured and risk-averse assessments about the long-term consequences of proposed decisions." Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 150 (2010). The "unrealistic optimism," of course, belongs to the constituents, not to the entity.

[99] As Judy McMorrow points out to me, the imperfection may result from a number of sources. Agents misread their principal's interests. Those interests shift over time. Agents have their own interests which might affect their perceptions. Agents succumb to moral hazard influences. And so on. Conversation with Judith McMorrow, February 26, 2010.

> lawful and available option. MCDC would be fully within its rights to do it. But here's an interesting angle we need to cover next: I need to be sure that MCDC as an agency wants to take this aggressive stance. Again, it has every right to do so, and I'd happily assist in getting this done and defending the agency after its does so. But I need to be sure that it's not just Mercedes, but MCDC, that wants this. Let's talk about why you see this as the way that the agency would want to go. Have you spoken to P.D. Twesigye, your executive director, about her feelings regarding tactics like this?[100]

One further issue deserves examination here, before moving on to a different version of group client counseling. If it is true that Dan owes to Mercedes somewhat less deference because of her status as a constituent, and therefore will play a more active and directive role in his counseling conversations with her, the question becomes what Dan ought to rely upon to inform his greater directiveness in that relationship.[101] If Dan is not relying on Mercedes as the source of his wisdom about what the agency should do, on what should he rely?[102] Is this revisionist model of constituent counseling suggesting a form of paternalism and lawyer control for lawyers representing organizations?

Dan has no greater moral or strategic right to act in a paternalistic fashion with MCDC than he would with his individual client in a divorce.[103] At least with private organizations,[104] Dan owes his orga-

---

[100] A few readers of an earlier (and perhaps starker) version of this conversation have noted the worry that Mercedes would not take kindly to this kind of second-guessing. If that is a reliable observation, the question becomes whether that consequence trumps Dan's need to ensure that he satisfies the interests of his client. Dan has two (sometimes) competing duties—to represent his client's interests in the best manner possible, and to work comfortably and productively with the client's constituents. In balancing those duties, Dan will exercise his practical judgments, appreciating the specific factual context of any given interaction, to discern whether, and how much, to inquire about the constituent's fiduciary accuracy.

[101] Note that Dan would likely *not* second-guess or press Mercedes if she opted for the less risky alternative. It was the aggressive stance that triggered Dan's gentle interventions. If that is so, Dan may be exhibiting a practice identified by Sue Bryant and Jean Koh Peters in their exploration of cultural differences within lawyering—the tendency to inquire more about matters which are different from what the lawyer would have done. *See* Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, AND LAW 47, 52-53 (Kimberly Barrett & William George eds., 2004). In this setting, the seeming double standard may in fact be justified. It is consistent with ethical judgments in the medical field about paternalistic interventions with questionably competent persons. *See, e.g.*, Loren H. Roth, Alan Meisel & Charles W. Lidz, *Tests of Competency to Consent to Treatment*, AM. J. PSYCHIATRY 279, 282-83 (1977) (paternalist intervention more justified when patient choice creates high risk of harm).

[102] I thank the participants of the UCLA/BYU Conference for pressing this issue.

[103] For purposes of this discussion, I accept as a given that paternalism, at least in its "crude" sense, is not a proper basis for a lawyer's decisionmaking with a client possessing decisional competence. *See* William Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 224 (1991) (making the distinction between crude and refined paternalism); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Au-*

nizational client precisely the same respect for its autonomy as he owes to his divorce client.[105] Dan's greater directiveness springs not from a professional conception that Dan knows better than the constituents what is best for the organization, but instead from two sources. First, as the example just above hinted at, Dan has a duty to test whether the constituent with whom he happens to be meeting accurately represents the preferences of the entity. That duty is unconnected, conceptually, from Dan's personal knowledge of and exposure to the entity's functioning. His questioning does not imply any disrespect for nor does it intend to raise doubts about the constituent's fidelity to or competence within the organization. As a lawyer, Dan simply needs to be sure that the choices he will respect belong to the entity.[106]

Second, Dan *might* himself be a source of expertise about the organization's preferences, and he may rely upon that expertise to complement that of the constituent.[107] This reality reflects a discrete dissimilarity from Dan's role with an individual client. The conventional neutral posture of a lawyer working with an individual stems from both the lawyer's moral duty to respect the preferences of the client, plus the realization that the lawyer lacks expertise to identify or unearth those preferences.[108] If one central goal of a counseling session is to arrive at a decision which bests satisfies the client's needs and preferences, a lawyer can never know as well as the client what those needs and, especially, preferences are.[109] The neutral stance is

*tonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307, 320 (critiquing Simon's distinctions).

[104] The term "private" can mean one of two things, and each supports the argument made in the text. If the organization is privately-owned and not publicly traded, then Dan's deference to its owners/managers is greater than it ought to be if the organization has shareholders. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper,* 74 FORDHAM L. REV. 983, 998-99 (2005). Similarly, if the organization has a public (as opposed to a private) mission, Dan's responsibility to respect that mission would change the assertions made in the text.

[105] Whether Dan's role with a community group is different is a question we take up later. *See* text accompanying notes 195-96 *infra*. While MCDC is a nonprofit organization and thus qualifies as a community group, for now we shall ignore that factor.

[106] In this respect Dan finds himself in the role of any corporate lawyer with duties to an entity and not to its constituents or managers. *See generally*, MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, LEGAL ETHICS AND CORPORATE PRACTICE 76-96 (2005).

[107] This observation is consistent with William Simon's arguments supporting corporate lawyers' discretionary judgments about an organization's "framework of dealing" as the most faithful avenue of satisfying the entity's, rather than any particular constituents', interests. *See* Simon, *supra* note 85, at 86-101.

[108] *See* LAWYERS AS COUNSELORS, *supra* note 13, at 368-69.

[109] *Id. See also* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 516-17 (1994) ("critical lawyers see the client's story as the only story worth telling"; lawyer should not presume to succeed in translating that narrative). Even the "collaborative model" theorists accept some limits on the lawyer's

grounded in large part on what is essentially an epistemological insight, that the lawyer cannot know the things necessary for making the best decision.

That epistemological limitation simply is not as prevalent when the lawyer's client is a group client. Put another way, the epistemological challenge is a quite different one. With an individual client (say, the wife in the divorce matter), she may have great difficulty discerning what she wants to do,[110] but in the end only she can make that judgment in anything close to a reliable or sensible way.[111] With an organizational client, while it also may have great difficulty discerning what it wishes to do, its process of discernment is more open to examination and input. When Dan works with Mercedes to make a hard choice about the deposit, she presumably has reliable and sophisticated institutional knowledge, but Dan may have his own knowledge base which may properly inform the counseling discussion. Indeed, in some settings the lawyer may have a much richer familiarity with organizational culture and history than a relatively new constituent. The point is that nothing in the strategic and ethical considerations governing effective counseling requires Dan to refrain from engaging in the process as a constituent himself, other than the important prophylactic worry about possible conflict of interest.[112]

### *C. Counseling Loosely-Structured Group Clients*

#### *1. Representation of a Loosely-Structured Group*

It is not uncommon for a community group to consist of a collec-

understanding of the client's unique personal story. *See, e.g.*, COCHRAN ET AL., *supra* note 19, at 20-25 (warning of the risks of lawyer translation).

[110] The interviewing and counseling scholarship respects an individual client's moral right to make choices about the direction of her life, but that literature does not pretend that individual clients find that task to be an easy one. Indeed, it can be frightfully difficult. *See, e.g.*, John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1357 (2003) ("[e]mpirical research indicates that many clients do have difficulty making decisions"); Spiegel, *supra* note 103, at 308 ("individual clients frequently have difficulty making decisions").

[111] One sensible way might be for her to delegate the decision to her lawyer, simply as a way to resolve some irreparable uncertainty. That choice, though, remains hers and hers alone.

[112] As Mark Spiegel observed in his early work on informed consent in the legal profession, one powerful ethical argument in favor of the lawyer's respecting the client's choices in a neutral way is the concern for conflict of interest. *See* Spiegel, *supra* note 6, at 123. The lawyer's interests often diverge from the client's interests in the course of representation, and informed consent and client-centered counseling together play a prophylactic role in limiting the lawyer's inadvertently influencing a client based upon what is more important to the lawyer. *Id.*, at 72-74. By recognizing, as this Article does, a less agnostic role for the lawyer representing an organization, the conflicts worry reappears.

tion of concerned individuals who have not (yet) organized themselves into a structured corporation or similar entity.[113] We need to consider how a lawyer ought to work with such a group, especially as she considers her counseling responsibilities. Our review of this subject may be divided into two components. First, in this section, we consider the implications of establishing an attorney-client relationship with a group which does not possess a preexisting organizational structure. Then, in the following section, we review the counseling responsibilities of a lawyer working with such a group client.

The first question we confront—and it is a critical one—is whether a lawyer *may* represent a loosely-structured group, and enter into an attorney-client relationship with that group. Given, as we concluded above, that a lawyer may only represent a group either via a joint representation model or an entity representation model, it is essential to understand whether an unstructured, unincorporated collection of persons—aside from those who see themselves as a gathering of discrete if affiliated individuals—could serve as an "entity," for attorney representation purposes, without the presence of a formal organizational structure. This question is especially important in the community group context. If the entity representation model is not available with loosely-structured collectivities, then the lawyers working with such groups are left with the joint representation model. That latter model, as the preceding discussion showed and as later discussion here will amplify, is not well suited to the goals sought by community lawyers.[114]

The authorities are not at all clear regarding the legal status, within the attorney-client relationship, of a loosely-structured group, and the community lawyering literature has thus far elided this question.[115] The Restatement (Third) of the Law Governing Lawyers in-

[113] *See, e.g.,* Ellmann, *supra* note 11, at 1162 (noting that Ellmann's analysis concerns "relatively informal, democratic groups"); Diamond & O'Toole, *supra* note 2, at 488-92 (offering stories of loosely-structured groups but not treating them as aggregates of individual clients).

[114] *See* Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALBANY L. REV 715, 752 (2010) (describing the tension in community lawyering between the needs of the larger group and the interests of individual members).

[115] While several commentators have noted the applicability of Rule 1.13 to community group representation, none has confronted directly (or sufficiently in depth) the issue of the status of an informal group. *See, e.g.,* Bennett, *Embracing the Ill-Structured Problem*, *supra* note 9, at 70 (noting the persistence of the client identity question, but not attempting to resolve the issue); Diamond & O'Toole, *supra* note 2, at 512 (lamenting the lack of fit of Rule 1.13 to the fluid community group context); Ellmann, *supra* note 11, at 1160-61 (applying Rule 1.13 to an informal group without addressing the lawyer's capacity to establish the relationship with the apparent entity); Southworth, *supra* note 1, at 2465 (reporting empirical research showing that community groups often do not have any "duly authorized

cludes informal organizations in its definition of entities, and does not insist that the informal group otherwise have legal standing.[116] The Model Rules agree that Rule 1.13 applies to "unincorporated associations";[117] and, while the Rules also state that "[a]n organizational client is a legal entity,"[118] an ABA ethics opinion construes Rule 1.13 as not requiring the group to possess "a separate jural entity."[119] Hazard and Hodes's commentary about the Rules offers an example of an ad hoc, informal group which qualifies as an entity for purposes of Rule 1.13: seventeen homeowners who choose to hire a single lawyer to represent them as a group, not as a collection of individuals, with the homeowners having agreed that the collectivity will be bound by a decision endorsed by twelve of the seventeen group members.[120] While the Hazard & Hodes example appears quite appropriate for the community group context, the commentators add a dramatic limitation to their understanding of the entity representation conception:

> It should be stressed, however, that if the "entity" [i.e., the homeowners association just described] is not sufficiently formal to have a *real legal existence*, such as having a charter and by-laws, then the representation will be considered to be of a series of individuals . . . .[121]

If the Hazard and Hodes commentary is correct,[122] then the responsi-

constituents" as Rule 1.13 contemplates).

[116] RESTATEMENT, *supra* note 50, at § 96, Cmt. *c* ("whether the organization is a formal legal entity is relevant but not determinative" to the entity conception). The Restatement offers as examples of such informal entities "a social club or an informal group that has established an investment pool." *Id.*

[117] MODEL RULES, *supra* note 52, at R. 1.13, Cmt. 1. When this Article addresses an unincorporated association, it refers to a group which has not formed a formal business entity in its jurisdiction, as would be the case for many community groups. In the business law world, an unincorporated association could include any business entity which is not a corporation, including any variety of partnership and limited liability companies. *See, e.g.*, DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE AND POLICY 53-135 (2009) (addressing "unincorporated business entities" in that fashion); LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010) (describing the rise of unincorporated associations (for which Ribstein coins the term "uncorporation") such as LLCs).

[118] *Id.* Not every unincorporated association is a recognized legal entity for purposes of state law. *See* text accompanying notes 126-28 *infra*.

[119] ABA Comm. on Ethics & Prof'l Resp., Formal Op. 92-365 (1992) (concluding that an unincorporated trade association may be treated as an entity for purposes of conflicts of interest).

[120] HAZARD & HODES, *supra* note 59, at § 17.4, pp. 17-15. *See also* Ellmann, *supra* note 11, at 1116 (discussing the Hazard & Hodes example).

[121] HAZARD & HODES, *supra* note 59, at § 17.4, pp. 17-15 – 17-16 (emphasis supplied).

[122] William Simon offers some historical support for the Hazard and Hodes assertion. *See* Simon, *supra* note 85, at 113 ("In the past, legal doctrine has tended to draw a sharp distinction between formally and informally organized associations. While formally organized ones were treated as entities, informal organizations were treated as joint individual representations.").

bility of a lawyer working with an ad hoc community group would be very different from that described by most of the community lawyering scholarship, which generally assumes a commitment from the lawyer toward the community group.

It is not apparent that the Hazard and Hodes gloss is a necessary one. Contrary to their assertion, it appears to be the case that a lawyer might establish an attorney-client relationship with an informal group lacking a charter or formal by-laws. It is true, as Hazard and Hodes imply, that an unincorporated association does not have any distinct legal status in many states.[123] Several states have adopted a version of the Uniform Unincorporated Nonprofit Association Act, which provides otherwise informal associations with rights, duties and protections.[124] In those states, the compliant unincorporated associations will have recognizable status, and surely a lawyer may represent such an association as an entity. Similarly, there is little doubt that representation of a partnership implicates entity representation obligations,[125] and partnerships often emerge as unincorporated associations.[126] For associations lacking such discernable state law recognition, however, the traditional rule has held that the association's lawyer represents the association's members, since no "entity"

[123] *See generally* Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389, 391 (1995) (some courts do not recognize an association as a legal entity separate from its constituents); United States v. American Radiator & Standard Sanitary Corp., 278 F. Supp. 608, 614 (W.D. Pa. 1967); Schwartz v. Broadcast Music, 16 F.R.D. 31, 32-33 (S.D. N.Y.1954).

[124] *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008) [hereinafter "RUUNAA"]. For examples of state statutes implementing the Model Act or its 1996 predecessor, see Ala. Code §§ 10-3B-1 to 10-3B-18 (Alabama); D.C. Code § 29-971.12 (2001); N.C. Gen. Stat. § 59B-2 (2006) (North Carolina); Art. 1396-70-01 (Texas). The introductory comments to RUUNAA imply that it offers a codification of some common law principles and practices, which supports the conclusion that in some states without RUUNAA or its predecessor unincorporated associations have some legal status. *See* RUUNAA, *supra*, at "Prefatory Note."

[125] For examples of partnerships in which the lawyer was found to represent the entity and not the partners, see Chaiken v. Lewis, 754 So. 2d 118, 118 (Fla. Dist. Ct. App. 2000); Johnson v. Superior Court, 45 Cal. Rptr. 2d 312 (Ct. App. 1995); Morin v. Trupin, 778 F. Supp. 711 (S.D.N.Y. 1991); Mursau Corp. v. Fla. Penn Oil & Gas, Inc., 638 F. Supp. 259 (W.D. Pa. 1986). *See also* ABA Comm. on Ethics & Prof'l Resp., Formal Op. 91-361 (1991); Keatinge, *supra* note 123, at 403-04.

[126] *See, e.g.,* SCOTT B. EHRLICH & DOUGLAS C. MICHAEL, BUSINESS PLANNING 42 (2009) (general partnerships formed merely by associating in business activity, with no more formal measures needed); 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP §§ 1.20 – 1.21 (1996) (explaining partnership formation); UNIFORM PARTNERSHIP ACT (REVISED) § 202(a) (1997) ("the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership," subject to certain exceptions).

exists.[127] But that traditional understanding is changing.[128]

The ABA's Committee on Ethics and Professional Responsibility, in Formal Opinion 92-365, offered a more nuanced understanding of the lawyer's duties to an informal group, although with less analysis than the issue deserves. The opinion concluded, without a great deal of discussion, that a lawyer representing an unincorporated trade association could serve as counsel to the organization and not to its members, even if the organization did not have any independent legal status.[129] Following that ethics opinion, the United States District Court for the Western District of Michigan in the *City of Kalamazoo v. Michigan Disposal Service Corp.* recognized a distinction between unincorporated associations "whose existence and interests are [so] intertwined with those of the individual members" as not to be treated as separate entities, and those with "operations, employees and continuing existence separate from its members," which a lawyer may treat as an entity.[130] While the definition offered by the District Court is close to question-begging,[131] it nevertheless grasps a reality of a group *qua* group, which captures the essence of much of the community lawyering literature.[132]

---

[127] City of Kalamazoo v. Michigan Disposal Service Corp., 125 F.Supp 2d 219, 236 (W.D. Mich. 2000) ("Because unincorporated associations had no separate legal existence, courts regularly held that attorneys for unincorporated associations had a direct attorney-client relationship with each of the members of the association.") *citing* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 930 (7th Cir. 1972); Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 341 (D. Mass. 1982); Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 294 F. Supp. 1148, 1149 (E.D. Pa. 1969) ("Each individual member of an unincorporated association is a client of the association's lawyer.").

[128] City of Kalamazoo, 125 F. Supp.2d at 236. *See* LAWRENCE J. FOX & SUSAN R. MARTYN, THE ETHICS OF REPRESENTING ORGANIZATIONS: LEGAL FICTIONS FOR CLIENTS 263-64 (2009) (applying Rule 1.13 to an unincorporated homeowners association).

[129] Formal Op. 92-365, *supra* note 119. The opinion relies upon Model Rule 1.13's comment stating that the Rule applies to unincorporated associations, but ignores an accompanying sentence in the same comment which states that an organization is a "legal entity." *See* MODEL RULES, *supra* note 52, at R. 1.13, Cmt. 1.

[130] City of Kalamazoo, 125 F. Supp. 2d at 236. *See also* Franklin v. Callum, 804 A.2d 444 (N.H. 2002); Greate Bay Hotel & Casino, Inc. v. City of Atlantic City, 624 A.2d 102 (N.J. Super. 1993).

[131] The court's description fosters as many uncertainties as it resolves. The reference to "employees" (*see City of Kalamazoo*, 125 F. Supp. 2d at 236) is, seemingly, offered as an example and not as a condition. Similarly, the reference to "continuing existence separate from its members" (*id.*), when describing an unincorporated association, must be intended in a metaphorical and not a legal sense, for otherwise no unincorporated association, short of those covered by partnership law (*see* notes 125-26 *supra*) or the Uniform Nonprofit Act (*see* RUUNAA, *supra* note 124), would be covered by the description.

[132] A compelling, if perhaps unique, example of an unincorporated association possessing the quality of an entity is that of a labor union. While now addressed by federal legislation, historically the status of a labor union as an entity separate from its members was the subject of much disagreement. *See* Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Sub-*

Given this evolving understanding of the status of unincorporated associations, we may proceed in our analysis by accepting, at least for the sake of our ethical deliberation, that a lawyer may have as a client a group of persons without a formal organization—say, the Hazard and Hodes homeowners[133]—whom the lawyer will treat as an entity. It is, of course, a very good thing that the substantive law evidences an emerging appreciation for the value of collectivity, given the importance that groups—including community groups—play in society.[134]

Before we address how the lawyer's counseling of such a client compares to the conventional Binder & Price model (or the variation we adduced above in the context of well-structured groups), we must recognize an important predicate, one which helps us address the counseling questions. A moment's reflection demonstrates that, while it is true that she may lawfully represent a loosely-structured group such as an unincorporated association, a lawyer *may not do so* within the constraints of the law of lawyering unless her client achieves many of the attributes of a well-structured organization. That insight seems indisputable, but it is not necessarily self-evident, nor accepted within the literature about counseling community groups.[135] Before a lawyer establishes an attorney-client relationship with a group *qua* group, she must ensure several things, things which she would know with some confidence if her client were a formal entity such as an LLC or a corporation. The first of these is rather obvious: The lawyer must insure that the group members recognize themselves as a group. With a loosely-structured group this step is essential, but it is presumably readily accomplished (if perhaps a bit complex in its implementation[136]).

---

*stantive Law*, 37 S. TEX. L. REV. 1095, 1098-1100 (1996).

[133] *See* HAZARD & HODES, *supra* note 59, at § 17-4; *see* note 120 *supra*.

[134] *See, e.g.*, AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995) (exploring the value of collectivity in our society); Lee Anne Fennel, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006) (exploring "associational" property benefits).

[135] *See, e.g.*, Diamond & O'Toole, *supra* note 2, at 510-11 (resisting the application of formal structures on an organic, fluid group); Diamond, *supra* note 1, at 70-72 (referring to well-structured collectivities as "bureaucratic groups," distinguishing them from "extemporaneous groups," and arguing that community groups fit the latter description much better than the former); Southworth, *supra* note 1, at 2465 (noting that community groups often have no duly authorized constituents). *But see* Michael J. Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1, 2 (1980) (suggesting that lawyers for community groups must find a formal set of structures before they may properly represent the groups).

[136] Since this Article addresses a lawyer's counseling obligations and responsibilities, we ought to recognize that the lawyer will sometimes need to counsel the group about the benefits of proceeding as a group rather than as a collection of individuals. With a loosely-structured group, that choice is available, unlike with a formal entity such as an LLC, and it is more available if the population of the loosely-structured group is smaller and more easily identified. Of course, in her counseling conversations with the group members, the lawyer must attend to the status of her relationship with each member during that prelimi-

Second, the lawyer must identify which individuals are members of the group. Occasional stories of progressive lawyers representing community groups imply a looser identity of the client constituency,[137] but traditional understandings of privilege, confidentiality, fiduciary duty, conflicts of interest and malpractice require that the lawyer understand with some certainty which persons are her constituents and which are not.[138] A lawyer's conversation with a constituent of her entity client will usually be protected by the attorney-client privilege, while her conversation with a non-constituent (and thus non-client) will obviously not be privileged.[139] A lawyer who assumes incorrectly that a certain individual is a constituent risks revealing confidences to a non-client,[140] waiving an existing privilege,[141] and possibly triggering

nary discussion. It seems inevitable that, for the preliminary purpose of determining how the collection of individuals will constitute themselves, the lawyer will owe some duties to each member individually, which is to say that she will have established a limited attorney-client relationship with each. This conclusion arises from the following reasoning: During her conversations with the group members about whether to proceed as an entity or as individuals (either jointly represented by the lawyer or through separate lawyers), the lawyer is representing *somebody*. She is offering legal advice to people who will use it and rely upon it. *See* RESTATEMENT, *supra* note 50, at §14 (describing the factors necessary to establish an attorney-client relationship). Since the entity theory cannot yet apply to this interaction (that is the question for the membership to decide), the individual model serves as the default orientation. The lawyer may, then, have to engage in the same kind of conflict of interest warnings that we encountered above in our review of a client's agreement to joint representation. *See* text accompanying notes 63-75 *supra*.

[137] Most of the stories emerging from the community lawyering scholarship describe loosely organized and, as Michael Diamond describes them, "fluid" collectivities. Diamond, *supra* note 1, at 72 ("fluid membership" in community groups). *See also* Bennett, *Embracing the Ill-Structured Problem*, *supra* note 9, at 70 (noting her clinic's common "inquiry not merely into the client's professed goals but into the client's very composition"); Marshall, *supra* note 1, at 148 (describing an "unattached community advocate," without any formal attorney-client relationship); Piomelli, *supra* note 1, at 457 (describing community lawyers "engage[d] with clients and neighborhood residents as partners in a joint effort"); Seielstad, *supra* note 5, at 468-69, n.69 (discussing "moving forward without identifying and officially retaining a cognizable entity or individual as our client").

One apt example of the tension envisioned here is that of a lawyer's negotiating a "community benefits agreement" (CBA) on behalf of a "community" affected by planned development. *See* Patience A. Crowder, *More Than Merely Incidental: Third-Party Beneficiary Rights in Urban Redevelopment Contracts*, 17 GEO. J. ON POVERTY L. & POL'Y 287, 330-32 (2010) (exploring the enforceability of CBAs); Naved Sheikh, *Community Benefits Agreements: Can Private Contracts Replace Public Responsibility?*, 18 CORNELL J.L. & PUB. POL'Y 223, 233-34 (2008) (difficulties with CBAs because of the fluidity of the communities affected).

[138] *Compare* Keatinge, *supra* note 123, at 413-17 (discussing these issues in the context of representing unincorporated business associations).

[139] *See, e.g.,* United States v. Upjohn, 449 U.S. 383 (1981) (organizational attorney-client privilege under federal law); Samaritan Foundation v. Goodfarb, 862 P.2d 870 (Ariz. 1993) (state organizational privilege); RESTATEMENT, *supra* note 50, at § 73 (offering a very broad organizational privilege).

[140] *See* MODEL RULES, *supra* note 52, at R. 1.6.

[141] A privileged communication may be waived by inadvertent disclosure to a non-party.

a conflict of interest.[142] The lawyer obviously needs to know to whom her duties of care lie, and which of the individuals—if any—might have claims against her for malpractice should the representation go awry.[143]

Finally, the lawyer must understand with considerable confidence the decisionmaking structure of the entity.[144] In this way, the notion of a lawyer representing a loosely-structured group almost approaches a tautology, because the lawyer cannot accept such a group as a client unless the group has become, at least in this fashion, well-structured. The reason for this conclusion should be clear. In order for the lawyer to apply the entity theory to her representation, she must accept the organization, not any of its constituents, as her client.[145] The organization, however, cannot advise the lawyer—and, indeed, the organization may not even *retain* the lawyer[146]—unless it has an authority-

*See* Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000) (waiver by revelation to public relations firm).

[142] If the lawyer treats a seeming group member as a client, and offers him some legal advice about his circumstances, her representation of her entity client might be jeopardized if that person's interests conflicted with those of the entity. *See, e.g.,* E.F. Hutton v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969) (firm disqualified from representing company after having offered legal services to a former officer).

[143] Some of the community lawyering scholarship envisions a lawyer connected to, and dedicated to, a diffuse community of affected individuals without explicit attention to the question of whether any of those persons could treat the community lawyer as *his* lawyer, and (should things turn out badly) sue the lawyer or law firm for malpractice. *See, e.g.,* Alfieri, *(Un)Covering Identity*, *supra* note 97, at 832 (describing subgroups within larger community groups); Diamond, *supra* note 1, at 127 (describing working with "resident leadership and its allies" in a community-based housing dispute); Ellmann, *supra* note 11, at 1152 (offering to meet with group members individually); Seielstad, *supra* note 5, at 505 (noting the ethical tensions in group representation but without identifying malpractice worries); *but see* Marshall, *supra* note 1, at 150-51 (addressing the question of client identity and conflicts of interest in community lawyering practices). Of course, if the entity theory applies, as we have assumed it does, none of the constituents of the organization would have a claim against the lawyer based upon a breach of duty of care theory, except through the entity's claims. *See, e.g.,* Palmer v. Fox Software, Inc., 107 F.3d 415 (6th Cir. 1997) (corporate constituent unable to recover against lawyer for malpractice); Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501 (9th Cir. 1993) (same). That defense available to the lawyer does not, however, minimize her need to understand the status of the individuals with whom she has contact while she works with a loosely-structured group client. "[T]he large volume of case law . . . shows that, whether or not they ultimately win, lawyers for corporations are frequently sued by constituents who claim an attorney-client relationship." *Types of Practice: Client Identity*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 91 at ¶ 10 (2004). While no such cases have arisen in the context of community groups, the potential for such claims is plain.

[144] *See* Bennett, *Little Engines that Could*, *supra* note 9, at 472-73; Fox, *supra* note 128, at 2.

[145] *See* MODEL RULES, *supra* note 52, at R. 1.13.

[146] This observation is an inevitable one, but its application in practice is subject to some uncertainty, given the fluidity of group work, especially within low-income communities. Some writers have assumed a lawyering relationship before the group has a decisionmaking structure in place. *See, e.g.,* Ellmann, *supra* note 11, at 1146-53 (discussing the lawyer's

generating voice emerging from some authority-generating process.

Consider a simplified example. Imagine the Hazard and Hodes story noted earlier,[147] but with a perhaps more realistic variation of its facts: Seventeen homeowners within a subdivision have decided that they ought to retain a lawyer to prosecute a nuisance action against a neighboring factory. At a meeting where twelve of the seventeen families are represented, the group agrees that three of its members will contact a lawyer, Kendra Dunlap, to inquire about her representation of them in this action.[148] Kendra agrees to meet in her office with the three individuals, Maritza, Sharon, and Frank, each a separate homeowner from the group. Her understanding from the preliminary conversations with Maritza, the person setting up the meeting, is that Kendra will be retained to represent what seems to be an unincorporated association. Kendra intends to accomplish that end in a way that manifests "best practices," both with respect to her fiduciary responsibilities to her soon-to-be group client, and with an eye toward protecting her from claims of professional malfeasance or breach of any duty of care.

Let us review Kendra's role responsibilities as she attempts to develop a relationship with her inchoate entity client:[149]

*(a) The Initial Meeting*: When Kendra meets with Maritza, Sharon and Frank, no unincorporated association yet exists.[150] If she

role in crafting the decisionmaking schemes with and for the group client).

[147] *See* text accompanying notes 120-123 *supra*; HAZARD & HODES, *supra* note 59, at §17.4.

[148] In the Hazard and Hodes story, the seventeen homeowners have already decided when they retain the lawyer that they will be bound by the votes of any twelve of the collectivity. *See id.* That factor permits Hazard and Hodes to make the points they need to make, but it seems quite serendipitous. More likely, one assumes, would be the variation in the text—the homeowners have a shared mission and approach the lawyer without having worked through the logistics of accomplishing their shared mission. The stories from the "community lawyering" literature tend to acknowledge that client groups (which, by the way, tend to be less powerful and less sophisticated than suburban homeowners) come to the lawyers with more diffuse instructions and organization.

[149] To reaffirm the obvious, if the homeowners were an established state corporation and chose to retain a lawyer, none of the forthcoming strategic issues would concern Kendra, because the authority schemes and the status of the members of the organization would be clear from the corporation's organizing documents and the entity's organizational "framework of dealing." *See* Simon, *supra* note 85, at 86-96 (recommending that lawyers rely less on formal concepts and more on an organization's framework of dealing to determine how to respond to internal dissonance).

[150] This discussion assumes that, for purposes of Rule 1.13 and its representational duties, no "entity" arises until the organization itself achieves some form of identifiable core. The 17 homeowners who have agreed to their collective mission of ridding their neighborhood of the nuisance do not qualify yet as an entity merely by virtue of that collective mission. Put another way, the default orientation under the law of lawyering is an individual representation model. Put yet another way still, a lawyer takes great risks if she assumes that her fiduciary duties run to an emerging and inchoate entity and not to its

is meeting with the three homeowners in her capacity as a lawyer (a given here), Kendra must consider the three persons as her individual clients for the present purposes. She would not yet have any direct relationship with the other fourteen homeowners, except in this way: Kendra could offer to the three persons her advice about their fiduciary responsibilities toward the remaining group members, at least for the limited time before the group emerges as an entity, as an unincorporated association. For this limited purpose, then, we might understand Kendra to represent the three persons in their role as fiduciaries, as guardians, of the interests of their compatriots.[151] Kendra will of course make the two following elements of that role quite clear to Maritza, Sharon and Frank: its temporal limitation (assuming that soon enough Kendra will represent only the entity and not these constituents), and the gloss on the relationship triggered by her understanding that Maritza, Sharon and Frank are present as agents and fiduciaries, and not simply in their individual capacities pursuing their individual interests. Kendra ought to obtain informed consent from each individual to the limitations of this representation.[152]

*(b) Choosing to Proceed as an Entity*: In some metaphysical way, the "entity" of this homeowners association might be said to exist once the seventeen members agree to their shared mission, but from Kendra's perspective she does not yet recognize an entity which may be her client. It is fair to say that, given what we see Kendra having learned so far from the three client/fiduciaries, she could not establish an attorney-client relationship with the homeowners association. Kendra, of course, may assist her three agent/clients to establish the organization, just as lawyers represent promoters to form an entity all the time.[153] But first, she would have the responsibility to counsel the

membership in the absence of great clarity to the contrary.

[151] Understanding her role here as a lawyer for a fiduciary (at least provisionally), Kendra has some guidance about how she ought to treat the persons who are nominally her clients. Some courts hold that an attorney retained by a guardian owes a duty to the ward as well. *See, e.g.,* Fickett v. Superior Court of Pima County, 558 P.2d 988, 990 (Ariz. App. 1976). The threshold inquiry is whether the non-client plaintiff was the intended beneficiary of the attorney-guardian relationship. *See* Trask v. Butler, 872 P.2d 1080, 1084-85 (Wash. 1994). For a discussion of these issues, see Charles M. Bennett, *Frontiers in Ethics: The Estate Lawyer's Duty of Loyalty and Confidentiality to the Fiduciary Client: Examining the Past to Make Wise Choices Now and in the Future*, 33 OHIO N.U. L. REV. 807 (2007).

[152] *See* MODEL RULES, *supra* note 52, at R. 1.2(c) (limitation of representation permissible if not unreasonable and the client provides informed consent). If she understands that the limitations engendered by her working with the three persons as fiduciaries rather than as self-interested actors as a form of conflict of interest (that is, Kendra's dedication to the fiduciary goals conflicts with her duty otherwise to the individuals), she must obtain any informed consent in writing. *Id*, at R. 1.7(c).

[153] *See, e.g.,* EHRLICH & MICHAEL, *supra* note 126, at 10-11 (describing the lawyer's relationship with promoters, those who work with counsel to create an organization);

three persons—along with any others within the group who choose to attend a meeting with her[154]—about the wisdom of proceeding as an unincorporated association versus proceeding in some other way.[155]

If she sees the role of her three clients as fiduciaries, Kendra may properly work directly with them to assist them to work with the remaining fourteen homeowners to decide whether to form an association. Nothing requires her to have any other contact with the remaining homeowners for this undertaking. Kendra may employ the conventional Binder & Price counseling model in this task,[156] outlining the discrete alternatives, describing their components, and eliciting the advantages and disadvantages of each in turn. Nothing, thus far, suggests that Kendra would proceed in anything but a neutral fashion with these individual clients choosing among those alternative avenues.[157]

---

SCOTT THOMAS FITZGIBBON, PROFESSIONAL ETHICS, ORGANIZING CORPORATIONS, AND THE IDEOLOGY OF CORPORATE ARTICLES AND BY-LAWS 12-13 (1982) (reviewing the ethical considerations inherent in representing promoters).

154 A practical understanding of this story suggests that, if Kendra were to meet with her clients on several occasions before the emergence of a recognized entity client, some other members of the original 17 homeowners might attend a later meeting with Kendra. If Kendra has established a limited and special purpose attorney-client relationship with Maritza, Sharon and Frank as described above, she must be attentive to the role played by a new homeowner who attends a later meeting. It appears that Kendra has a choice to add that homeowner as another fiduciary/client like the first three, or to treat that newcomer as a non-client attending a meeting with her clients. Under the latter scenario, Kendra risks waiving the attorney-client privilege for her conversations during the meeting, unless the newcomer is seen as the "ward" of the three named clients. *See, e.g.,* Insurance Co. of North America v. Superior Court, 166 Cal. Rptr. 880, 886 (App. 1980) (the presence of a ward at a consultation between his guardian and the guardian's counsel would not result in waiver of the attorney-client privilege).

155 Stephen Ellmann concludes that the homeowners would have four options for proceeding—as individual, separate clients with a single lawyer (joint representation as we identified above); as clients choosing a lawyer as an "intermediary," using the now-discarded Model Rule 2.2; as an entity; and as a class action. *See* Ellmann, *supra* note 11, at 1113-19. For our purposes, we might amend Ellmann's list slightly. Kendra's clients could proceed as seventeen jointly represented clients; or Kendra could represent one of them to pursue injunctive relief from which the collectivity would benefit as well (if the facts permitted this remedy, of course); as an entity, formal or unincorporated; and as a class. It is not clear (and not relevant for our purposes) if seventeen members qualify as sufficiently numerous for class certification. Courts will presume numerosity when a class consists of forty or more people, but focus on impracticability rather than sheer numbers. *See* Cortigiano v. Oceanview Manor Home for Adults, 227 F.R.D. 194, 204 (E.D. N.Y. 2005); Sanft v. Winnebago Industries, Inc., 214 F.R.D. 514, 520-21 (N.D. Iowa 2003) ("In dealing with the issue of numerosity, we deal with it not in absolute numbers, but in the relationship of the numbers of the putative class members involved to their economic interests and all of the other circumstances peculiar to [each] case." (quoting Elliott Assoc. v. J. Henry Schroder Bank & Trust, 655 F. Supp. 1281, 1285 (S.D.N.Y.1987))).

156 *See* text accompanying notes 44-49 *supra* (describing the prevailing model and structure of a choice-based counseling session).

157 It is likely true that, along the continuum of deference to intervention within a counseling stance, counseling a fiduciary invites somewhat less deference from the lawyer than

*(c) Constructing the Unincorporated Association*: Imagine this, then: After Kendra has carefully advised Maritza, Sharon and Frank about the prospect of proceeding as an association, including the implications of entity representation versus individual representation,[158] the three report back to her that the seventeen homeowners wish to proceed as an entity. There is no reason, they have concluded, that the seventeen people ought to go to the expense and administrative burdens of forming a formal corporation, so they opt for an unincorporated association.[159] For convenience, assume they give the association a name—the Concerned Homeowners Improvement Association (CHIA).

Kendra cannot yet accept CHIA as her client—or, more accurately, she could not *do* anything as its lawyer even if she concluded that she has authority to be retained by the entity. The missing element is a scheme for CHIA's decisionmaking, the absence of which handcuffs any lawyer's work. While Kendra might conclude that she has sufficient authority to treat CHIA as her client given the report back from Maritza, Sharon and Frank, a conclusion which itself would

counseling an individual about his own personal legal matters, using the evaluative tools we explored above. *See* text accompanying notes 40-43 *supra*. What we referred to above as the "idiosyncrasy" factor has less weight when the client serves in a fiduciary role—indeed, the fiduciary's personal predilections should play no role at all in the substituted judgment process, which is the usual moral commitment of a guardian or trustee. *See* Guardianship of Doe, 583 N.E.2d 1263, 1267-68 (Mass. 1992) (discussing the use and expansion of the substituted judgment doctrine in the context of medical treatment); Peter Skinner, Note, *Tipping the Scales: How Guardianship of Brandon Has Upset Massachusetts' Balanced Substituted Judgment Doctrine*, 40 B.C. L. REV. 969 (1999). In the context described in the text, however, Kendra has little reason to assume anything but a fully deferential role, since she is, essentially, counseling her clients about how to counsel their compatriots. Indeed, since she is not asking Maritza, Sharon and Frank to make a decision, the idea of persuasion or intervention seems inapposite.

[158] The most important of which would be the fact that, under entity representation, Kendra would not be the lawyer for any of the individual homeowners. *See* MODEL RULES, *supra* note 52, at R. 1.13(f). This conclusion applies to an unincorporated association just as it would to a corporation, at least in some settings, and we have assumed for present purposes that this setting fits that description. *See* discussion accompanying notes 123-34 *supra*.

[159] If they intend to file a state court lawsuit to abate the nuisance, in most jurisdictions the collectivity cannot remain an unincorporated association, as unincorporated associations typically may not be party plaintiffs. *See, e.g.*, Diluzio v. United Elec., Radio and Mach. Workers of America, Local 274, 435 N.E.2d 1027, 1031 (Mass. 1982) (common law rule that "[t]here is no such entity known to the law as an unincorporated association, and consequently [an unincorporated labor union] cannot be made a party defendant," *quoting* Pickett v. Walsh, 78 N.E. 753 (Mass. 1906)). Rule 17(b) of the Federal Rules of Civil Procedure provides that unincorporated associations may sue or be sued as distinct entities in the district court where the claims at hand arise under federal law. FED. R. CIV. P. 17(b). As to all other claims, however, the capacity of an unincorporated association to sue or be sued as a distinct entity is determined "by the law of the state where the court is located." *Id.*

be questionable,[160] she plainly does not have a confident means to ensure that she has the necessary authority to take any lawyering actions on the client's behalf.

Just as she worked with Maritza, Sharon and Frank to prepare them to counsel the remaining fourteen homeowners about whether or not to proceed as an entity,[161] Kendra may now work with the three client/fiduciaries, or perhaps with the entire group of seventeen or some other subset of CHIA, to craft some authority scheme by which CHIA will make binding decisions upon which its lawyer will rely. Stephen Ellmann, in his thoughtful assessment of public interest lawyers' responsibilities with community groups, argues that at this stage a lawyer such as Kendra has a responsibility "for assuring a baseline of democratic and participative process within the group . . . ."[162] For Ellmann, that responsibility requires the lawyer to attend the meeting of the group, and to intervene sufficiently to ensure full participation by its members, and "to encourage silent members, during the meeting, to speak their minds."[163] Whether Ellmann's proposition has some greater force in the context of *community groups* is a question we shall examine in a later part of this Article,[164] but for our present purposes, where we seek to understand and articulate the best practices of a lawyer representing any unincorporated association, community-based or otherwise, his suggestions are unpersuasive, both in

[160] Because unincorporated associations are, well, unincorporated, the question of whether one exists or not is just a little bit ambiguous. When Maritza, Sharon and Frank report to Kendra that the homeowners have agreed to work together as a group (and assuming that the three have accurately communicated Kendra's warnings about the absence of any individual attorney-client relationships as a result of that choice), one might conclude (a) that an unincorporated association now exists and, perhaps more boldly, (b) that Maritza, Sharon and Frank have the authority from the association to retain Kendra as its lawyer. Given the usual operation of the doctrine of implied authority, Kendra takes little risk by accepting that the three client/fiduciaries are agents of the new association. *See, e.g.,* BRANSON ET AL., *supra* note 117, at 9-16 (discussing the role of agency principles in organizational practice); RESTATEMENT (THIRD) OF AGENCY, *supra* note 89, at 3.03; RUUNAA, *supra* note 124, at §15, Comment (a member of an unincorporated association is not an agent by virtue of membership, but may establish apparent agency by an established course of dealing).

[161] *See* text accompanying notes 151-56 *supra*. Of course, Kendra herself could counsel the group of 17, but the discussion assumes a setting where the lawyer works with leaders who work with the group.

[162] Ellmann, *supra* note 11, at 1145.

[163] *Id.* Interestingly, Ellmann does not assert expressly that a lawyer such as Kendra must attend the community group meeting; his discussion assumes that "counseling community groups" means that the lawyer counsels *the group*, rather than its agents. His discussion consistently envisions the lawyer at the meeting, and he puzzles through with wonderful sensitivity the complicated relationship between the lawyer and the individual group members. *See id.*, at 1135-70. As I develop in the text, that assumption does not seem a justifiable one, and is likely not a practical or realistic one in many contexts.

[164] *See* text accompanying notes 211-15 *infra*.

theory and in practice.

Consider Ellmann's arguments from the perspective of legal (and moral) theory. It is hard to disagree with the proposition that a democratically-run and fully participatory group is, by and large, more likely to be a successful group and more likely to satisfy the needs of its membership.[165] One could argue that it would be a good thing, all things considered and with a humble understanding of what we mean by "good,"[166] if CHIA were operated in that fashion. But for Kendra's purposes, she needs to know how to read her *group's* intentions, in a faithful and reliable way, and however those intentions were derived. If, for whatever reasons, the CHIA membership opted to proceed in an autocratic and non-participatory way and articulated that choice in some reliable fashion to Kendra, nothing in the law of lawyering, or in accepted applied ethics discourse,[167] would suggest that Kendra ought to resist accepting that delegation. CHIA possesses its own autonomy rights to choose its own decisionmaking matrices.[168]

Consider also Ellmann's critique from the perspective of Kendra's practice as a lawyer working with CHIA, a voluntary association of otherwise-busy homeowners. Ellmann's examples assume group meetings with full attendance by group members, and the lawyer's presence as well. While in her work with CHIA Kendra might attend a meeting with such qualities, it is far more likely, simply as a matter of workaday practicality, that the group meetings will have imperfect attendance, and that Kendra will meet more often than not with certain designated leaders or constituents than with a full group.[169] Cor-

---

165 *See* RUPERT BROWN, GROUP PROCESSES: DYNAMICS WITHIN AND BETWEEN GROUPS 218-19 (2000). Brown, in discussing "devices and procedures that maximize the effective participation of all group members," reports on research showing that, generally, group decisions arriving from broad participation tend to be better than those not so generated. *Id*.

166 *See* Simon, *Mrs. Jones's Case*, *supra* note 103, at 224 (noting the absence of a "thick theory of the good" outside of theological arenas, and instead understanding good by reference to some notions of autonomous choice).

167 *See* Diamond & O'Toole, *supra* note 2, at 519 (noting that there may be reasons to respect undemocratic processes, even with disadvantaged community groups). In her examination of the autonomy commitment toward individual clients (and not addressing groups), Katherine Kruse recognizes the value of "positive liberty" as a contributor to effective autonomous progress. *See* Kruse, *Fortress in the Sand*, *supra* note 24, at 413. Her reasoning supports some nudging by lawyers toward increased opportunity for their clients to exercise autonomy, but even her arguments do not suggest that a group may not choose to defer to leadership as an effective organizational device. *Id.* at 423-24 (supporting the concept of client empowerment). For further consideration of this point, *see* BROWN, *supra* note 165, at 218-19.

168 Diamond & O'Toole, *supra* note 2, at 524-25. Ellmann recognizes the group's rights in his article, but he understandably worries more about the autonomy rights of the members of the group. *See* Ellmann, *supra* note 11, at 1152.

169 While this topic has not been addressed in the community lawyering literature, it is

porate lawyers seldom meet with the employees, shareholders, or other constituents of the entity, and those lawyers are in fact limited in the direction they may take from constituents outside of the officers, directors or general counsel.[170] While it may be more likely for a lawyer working with an unincorporated association than a corporation's lawyer to be able to meet with the entity membership, the fact remains that Kendra needs a best practices guide that anticipates most of her meetings through some constituents.[171] Arranging (or at least discerning) a set of protocols about how she works with the unincorporated association's constituents is the essential task that Kendra must accomplish.

Therefore, Kendra may and likely will work with some association members to identify a protocol for making organizational decisions. Until she understands that protocol, Kendra may not take any legal action on behalf of her entity client.[172] But that conclusion

sensible to conclude that a lawyer for a community group will, as a practical matter in her work life, take direction from the group leaders, with membership meetings a rarer event.

[170] *See, e.g.,* FOX & MARTYN, *supra* note 128, at 58-59 (noting the importance of clarifying the internal organizational hierarchy). Corporate lawyers do not take direction from shareholders, even though the latter "own" the business. *See* Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181, 207 (2004) ("the lawyer takes her direction from the entity's duly authorized constituents"); Simon, *Anatomy of Intraclient Conflict*, *supra* note 85, at 82 (criticizing the Model Rules' limitation on lawyers' communication with shareholders about wrongdoing). Ordinarily, employees who are not officers do not direct a company lawyer, although the context may create such authority. *See* Charles Silver, *The Legal Establishment Meets the Republican Revolution*, 37 S. TEX. L. REV. 1247, 1250 (1996) ("[W]hen a constituent has apparent authority to retain an attorney on particular terms, the fact that the constituent lacks actual authority, by virtue of a contrary company rule, has no impact on the lawyer's obligations so long as the attorney reasonably believed that the constituent was authorized to enter into the retainer agreement.").

[171] One possibly critical by-product of the stance adopted here, compared to that proposed by Ellmann, is that the best practices being developed in this Article do not assume that the lawyer is an active member of the group process. Much of the community lawyering scholarship grapples with that role question, and we revisit it below in our consideration of the community group setting. *See* Ellmann, *supra* note 11, at 1166; Diamond & O'Toole, *supra* note 2, at 541-42 (implying group membership by the lawyer); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 502-10 (2001); Bennett, *Creating a Client Consortium*, *supra* note 9. For purposes of articulating best practices for lawyers working with unincorporated associations generally, and not necessarily within disadvantaged communities or with community groups, this part of the Article need not envision the lawyer to be herself an insider viewed by the other constituents as part of the group process. While nothing within the law of lawyering *prohibits* Kendra from playing that role, doing so does create delicate issues for the lawyer. We encounter those issues in our later discussion. *See* text accompanying notes 187-93 *infra*.

[172] Without that established protocol, Kendra risks acting without entity authorization, which invites both agency problems and malpractice exposure. *See, e.g.,* Shimko v. Guenther, 505 F.3d 987, 991 (9th Cir. 2007) (attorney should have known that limited partner was not general partner; claim for apparent authority denied); Zeiger v. Wilf, 775 A.2d

masks one additional consideration we must assess before moving on, and that consideration does tie into Ellmann's concern for participatory functioning within the group process. The question is this: How much need Kendra affirm with the group membership the protocols reported back to her by the leadership? In a formal corporate setting, this question simply does not arise, because the organizational documents provide a most reliable protocol for the lawyer.[173] In Ellmann's conception of the lawyer's role, this question does not arise either, because in his vision the group meets as a whole and the lawyer is present with the group.[174] But given the direction the preceding discussion has taken, this question is an important one for a lawyer such as Kendra.

Imagine, then, this scenario. After Kendra has counseled Maritza, Sharon and Frank about the need for CHIA to identify some scheme by which the entity may be bound and through which it may give its lawyer direction and authority, the three constituents depart to meet with the remaining fourteen members. When they return, Maritza, Sharon and Frank report to Kendra that the group has delegated full decisionmaking authority to the three leaders, whose majority vote will prevail on all matters. In other words, any two of the three leaders may bind the association. Like with the Hazard & Hodes example,[175] it appears that Kendra now has the protocol she needs to begin her lawyering work. May she rely on this report from Maritza, Sharon and Frank?

No best practices guide can answer that question with any certainty, because its response depends too much upon the context of the group interaction. In the absence of a formal written agreement, Kendra relies upon the three leaders, Maritza, Sharon and Frank, to serve as the source of Kendra's agency authority.[176] If we understand the

608, 616-19 (N.J. Super. A.D. 2000) ("safe harbor" provisions protect limited partner from liability as a general partner); *See also* 19 ROBERT W. HAMILTON ET AL., TEXAS PRACTICE § 14.6 (2d ed.) (speculating that "limited partner who tattoos 'I am a limited partner' on his forehead, or wears such a T-shirt, may participate in the control of the business without fear of being held liable as a general partner").

173 *See* FOX & MARTYN, *supra* note 128, at 57-59.

174 *See* Ellmann, *supra* note 11, at 1136-37.

175 HAZARD & HODES, *supra* note 59, at § 17.4, Illus. 17-2 (the group decided that a vote of twelve of the seventeen members would bind the group as a whole).

176 Whether the association's leaders are *agents* of the collectivity is an elusive consideration. If the leaders were board members of a formal entity, their status would be akin to, but probably not, that of agent for the entity. *See* Joan MacLeod Heminway, *Enron's Tangled Web: Complex Relationships; Unanswered Questions* 71 U. CIN. L. REV. 1167, 1171 (2003) (describing the "agency theory" of director status, which Heminway views as "both legally questionable and appealing"). Officers of a corporation more easily fit within the understanding of agents, because they answer to their "principal," the board. *See id.* at 1173-74.

lawyer as herself an agent relying upon the authority of another agent,[177] then we can assess her responsibilities under general agency law. That authority would hold that if the delegation of authority to her is reasonable under the circumstances, Kendra may proceed.[178] When it is reasonable under the circumstances is entirely dependent upon the circumstances. If the goal of the representation is for abatement of the nuisance or for some kind of similar injunctive relief, Kendra's authority may be more readily accepted. If, by contract, CHIA's goal is to collect damages to be divided up among its membership, Kendra's responsibility for confirming the decisionmaking scheme seems to be greater.[179]

Regardless of the context, nothing prohibits Kendra from communicating directly with each member of CHIA, by separate letters for example, to confirm her understanding of the decisionmaking protocol agreed to by the membership. Doing so seems a prudent action on her part notwithstanding the level of her comfort with the reported membership agreement.[180] This step also helps to accomplish a fur-

---

[177] Whether a lawyer is considered an agent of her client is once again a question without a clear answer. *See* James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFFALO L. REV. 349, 349-50 (2000); Deborah A. DeMott, *The Lawyer as Agent,* 67 FORDHAM L. REV. 301 (1998); Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship,* 86 NEB. L. REV. 346, 350-51 (2007). Because lawyers have more discretion and autonomy than agents traditionally have, some argue that lawyers are better understood as independent contractors. *See* DeMott, *supra*, at 305-06.

[178] *See* RESTATEMENT OF AGENCY, *supra* note 89, at §§ 2.03, 3.03; *see also* American Prairie Const. Co. v. Hoich, 560 F.3d 780 (8th Cir. 2009) (third-party must prove he acted in a reasonably diligent and prudent fashion to ascertain the fact of the agency and the nature and extent of the agent's authority); Udall v. T.D. Escrow Services, Inc., 154 P.3d 882 (Wash. 2007) (despite lack of actual authority, plaintiff could reasonably believe that principal or its agent would conduct the transaction in question based on principal's representations).

[179] *See* MODEL RULES, *supra* note 52, at R. 1.8(g) (discussing aggregate settlements); RESTATEMENT, *supra* note 50, at § 128, Cmt. *d(i)* (noting the importance of the lawyer's ascertaining the agreement of joint clients to the terms of an aggregate settlement). While both Rule 1.8(g) and the Restatement address joint representation, and not entity representation, the prospect that the members will divide up a collective judgment or settlement suggests greater risk on Kendra's part to insure the buy-in from the membership.

[180] Note that Kendra presumably has permission under Rule 1.6 to communicate about the subject matter of the representation with the constituents of CHIA. *See* MODEL RULES, *supra* note 52, at R. 1.6(a) (information related to the representation may not be disclosed without client consent or unless some exception applies). An organizational lawyer does not possess automatic permission to reveal protected information to every constituent of the organization merely because the constituents are part of the client organization. *See* RESTATEMENT, *supra* note 50, at § 96 cmt. *e* ("disclosure within the organization is subject to the direction of a constituent who is authorized to act for the organization"). In our example, Kendra has at least implied authorization to communicate directly with the CHIA membership. *See* Rule 1.6(a) (disclosure permitted when "impliedly authorized to carry out the representation").

ther necessary element of Kendra's representation of CHIA—ascertaining its defined membership, as discussed above.[181]

*2. Counseling a Loosely-Structured Group*

The exploration thus far has concluded that a lawyer might indeed represent a loosely-defined group as an entity, subject to the guidance of Rule 1.13 and its accompanying substantive law. But, precisely because the group is ill-defined and possibly ambiguous in its membership and in its organizational decisionmaking schemes, the lawyer may not accept the group as a client until she is certain (a) that the group has agreed to proceed as an entity; (b) that the group has a defined an identifiable membership who serve as the constituents of the entity; and (c) that the group has adopted and agreed to a scheme by which to take actions and make binding decisions, including the act of giving authority to its lawyer to proceed with legal work. While stories appear within the public interest literature of lawyers working with collectivities of persons with common shared missions but with fuzzy membership identities and ambiguous leadership arrangements,[182] and while undoubtedly lawyers work with such nebulous groups regularly, the conclusion here is that the laws of agency, professional responsibility and legal malpractice suggest some risks in such a practice.[183] Only by transforming the loosely-defined group into a better-defined group may a lawyer proceed to represent its membership using entity representation principles.

Assume that Kendra and CHIA have met the requirements just described, and that Kendra has in place a retainer agreement signed by her and by Maritza, Sharon and Frank on behalf of CHIA. The question now is the one originally conceived for this part of the Article: Do Kendra's counseling responsibilities change at all, when compared to her work with an individual client matter or from her work with a formal corporation or LLC, when her client is an ill-defined group?

We quickly realize that the question as just articulated must be refined. There is no doubt that Kendra's responsibilities when coun-

[181] *See* text accompanying notes 160-163 *supra*.

[182] *See* notes 135 and 137 *supra* (providing examples from the community lawyering scholarship).

[183] From my conversations with colleagues who work directly with community groups, I understand that fluid groups are inevitable, and that lawyers' work with those groups is equally inevitable. Furthermore, the lawyers' work supporting grass-roots, organic organization is very important, and will continue even if the groups cannot achieve the kind of formality, structure or bureaucracy that the substantive law of lawyering might seem to require. While the analysis here demonstrates the risks of that kind of practice, the lawyers committed to that kind of practice may conclude that those risks—which some may perceive as more conceptual than practical—are worth taking.

seling CHIA are different from her responsibilities with an individual client (like our comparison divorce client[184]) at least as much as they would differ when she works with a well-defined group client. Since we concluded above that a lawyer working for a formal corporation should (or at least may) interact differently with a constituent client compared to an individual client,[185] it is easy to discern here that, at minimum, the same reasoning would apply to a lawyer working with a constituent of an unincorporated association or similar nebulous group client. The more interesting question is whether the lack of a formal corporate-type structure changes the lawyer's role further, or whether we have already addressed this topic when we addressed the setting of the well-structured group. Put another way, our question as refined is this: Are the counseling protocols the same for well-defined and ill-defined group clients, or is there some difference caused by the fuzzier group structures in the latter case?

The fuzzier group structure does seem to create further differences for the lawyer in comparison to her work with a formal corporate structure. Those differences may be separated into two sorts, depending on whether the lawyer works through a constituent of the entity, or works with the unincorporated association membership as a whole. Let us review each of those areas in order.

*Counseling a Loosely-Defined Entity Constituent*: The discussion thus far has assumed that the lawyer will work with the unincorporated association through some constituent or constituents. Recall that this assumption departed from some of the writing about public interest lawyers working with community groups,[186] but it seems a reasonable (if assuredly not exclusive) assumption. When Kendra meets with Maritza, Sharon and Frank to counsel them about an important upcoming decision which the client CHIA must make, her responsibilities with them will mirror those discerned in the example of corporate constituent counseling, using the Dan and MCDC example above.[187] In the same way that we concluded that Dan has less of a moral or prudential obligation to honor the idiosyncrasies of the constituent with whom he happened to be meeting (when compared to a lawyer with an individual client), Kendra need not treat Maritza, Sharon and Frank as entitled to the same deference either. But the difference is greater in a loosely-structured group using constituents, for readily apparent reasons. The absence of a formal, articulated and

[184] *See* text accompanying note 103-08 *supra*.

[185] *See* text accompanying notes 85-86 *supra*.

[186] *See* Ellmann, *supra* note 11, at 1135-70; Diamond, *supra* note 1, at 119-20; Seielstad, *supra* note 5, at 466-67. *See* text accompanying note 169 *supra*.

[187] *See* text accompanying notes 88-89 *supra*.

binding authority structure within CHIA requires Kendra to bear a greater responsibility to get things *right*. While from the perspective of the law of lawyering Kendra may rely fully on the risk assessments and preferences of the appointed[188] leaders of CHIA without a concern about having breached her duties of care,[189] as a matter of her ethical commitment to be the best counselor for her entity client, Kendra *may* do more than that. Context matters a lot, again, but the inherent ambiguity of the leadership appointment of Maritza, Sharon and Frank permits Kendra to intervene with them even to a greater extent than she would if they were, say, managers of an LLC or officers of a corporation.

Consider a very brief and "thin" story to make this point clearer. Imagine that, as CHIA's lawyer, Kendra has been negotiating with the nuisance-creating actor about a possible resolution of the dispute. The negotiations have been productive, but reach a complicated sticking point. The nuisance-creating actor has made it clear that if CHIA went to the press or otherwise publicly disclosed the parties' dispute, the proposed deal would be off.[190] Kendra counsels Maritza, Sharon and Frank about their discrete alternatives—go to the press and (possibly[191]) endanger a seemingly advantageous settlement, or not go to the press and continue the negotiations. If her CHIA constituents order Kendra to go to the press, *and* if she has some reason to doubt whether that high-risk (albeit entirely lawful and permissible) tactic reflects the considered wisdom of the seventeen members of CHIA, Kendra may, and perhaps must as a matter of her moral obligation to the unincorporated association, resist the constituents in ways which she would seldom do with an individual client and would do less vigorously with a corporate constituent.

This more "activist" role for the lawyer representing a loosely-structured group stems from a number of considerations. The inherent doubts about the representativeness of the leadership in the

[188] We assume here that Maritza, Sharon and Frank have been approved by the CHIA membership to speak for it, or at least that Kendra has a good faith basis to believe that.

[189] *See* Silver, *supra* note 170, at 1250.

[190] For a real, and recent, example of this kind of negotiation, see, e.g., Glenwood Farms Inc. v. Ivey, 335 F. Supp. 2d 133 (D. Me. 2004) and Ehrlich v. Stern, 908 N.E.2d 797 (Mass. App. Ct. 2009) (internal disputes by plaintiffs' counsel, including Jan Schlichtmann, in Poland Springs class action proceedings, in which disclosures to the press may have led to a failure of negotiations).

[191] The threat by the nuisance-creating actor might be a bluff, of course. *See* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 132 (2d ed. 1991); Albert Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143 (1968) (defending the use of deception and bluffing in the business world); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1285 (1996) ("[s]uccessful bargaining often requires bluffing").

loosely-structured group suggest a greater responsibility on Kendra's part as the entity's lawyer.[192] The nature of unincorporated associations themselves, and the relationship of a lawyer to such a group, also increases the lawyer's vigilance. It is not unfair to assume that loosely-structured groups tend to be newer and deserve enhanced fiduciary attention from their lawyers. In some respects, the role for the lawyer here resembles that of a lawyer for a class in a class action proceeding. While the considerable substantive and procedural protections governing class actions provide significantly better guidance to plaintiff class lawyers than to the unincorporated association lawyers discussed here,[193] the role of a lawyer for a class *pre-filing* is closer to the present context.[194] In that setting as well in the conventional post-filing context, a lawyer representing a plaintiff class has explicit responsibilities to the unnamed class members, and may resist the suggestions of a named plaintiff whose choices are not deemed to be in the best interests of the collectivity.[195]

Especially when the loosely-structured group is large enough to

---

[192] The analysis in the text rests on a premise which may be questionable. It presumes that in formal groups the lawyer may respect the quality of the leadership in some reasonably reliable way, given the leaders' formal delegation of authority. In practice, of course, organizational leaders' fidelity to organizational goals is intrinsically subject to question. *See, e.g.,* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. REV. 797 (2001).

[193] *See* Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (2003); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995); Deborah L. Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982).

[194] A lawyer who represents a purported class before a lawsuit is filed owes a duty to the class. *See* FED. R. CIV. P. 23(g)(2)(A), 2003 Advis. Comm. Notes ("Settlement may be discussed before certification . . . . Whether or not formally designated interim counsel, an attorney who acts on behalf of a class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class."); MANUAL FOR COMPLEX LITIGATION §21.12 at 337 & n. 753 (4th ed. 2007) ("Rule 23 and the case law make clear that, even before certification or a formal attorney-client relationship, an attorney acting on behalf of a putative class must act in the best interest of the class as a whole."); 2 HAZARD & HODES, *supra* note 59, at § 38.4, at 38-7 (lawyers for the proposed class owes class members "duties of loyalty and care"); Piambino v. Bailey, 757 F.2d 1112, 1144 (2d Cir. 1985) (duty triggered because counsel, by "asserting a representative role," "voluntarily accepted a fiduciary obligation towards the members of the putative class"); In re M&F Worldwide Corp. Shareholders Litig., 799 A.2d 1164, 1174 n.34 (Del. Ch. Ct. 2002) ("[I]t is well established that by asserting a representative role on behalf of a proposed class, representative plaintiffs and their counsel voluntarily accept a fiduciary obligation towards members of the putative class.").

[195] *See* In re M & F Worldwide Corp. Shareholders Litigation, 799 A.2d 1164, 1175 (2002) ("Counsel in class action . . . owed a duty to act in good faith on behalf of all interested beneficiaries of the representative action, and not simply at the direction of the named plaintiffs.").

make counseling the entire group impractical (likely a common phenomenon in neighborhood-based community group representation), the lawyer working with the group's leadership shares the responsibilities of a class lawyer to ensure that the leaders' views are consonant with the aims and goals of the larger group.[196] The lawyer's "activism" with the leadership will depend also on how well the lawyer herself understands the group's aims and goals.

If the unincorporated association membership is reasonably manageable in size, the lawyer might suggest to the constituents/leaders that she wishes to speak with the entire membership before taking a high risk step such as the one imagined in the CHIA story above. One can easily imagine an unincorporated association in which, while the choice of spokespersons is clear enough for the lawyer to proceed with adequate authority, the quality of the delegation to that leadership is sufficiently uncertain that the lawyer would have the right—and perhaps the obligation—to reach out to the larger membership for confirmation of the leaders' chosen path. CHIA fits the first of these qualifications, as its seventeen members constitute a plausibly manageable group. Imagine that Kendra concludes in good faith that CHIA meets the second qualification as well, at least with respect to a high risk tactic such as going public over the objections of the group's adversary. That assumption permits us to address the role of a lawyer counseling a loosely-structured group through the membership as a whole.[197]

*Counseling a Loosely-Defined Entity Through Its Membership*: Stephen Ellmann has examined the dynamics of a lawyer counseling a

[196] Michael Diamond and Aaron O'Toole make this point. *See* Diamond & O'Toole, *supra* note 2, at 512-15.

[197] At the risk of developing too many permutations of the questions we are trying to understand here, I should note that we might further subdivide the contexts of a lawyer working with a loosely-structured group's full membership. The distinction I have in mind would be between such groups which have appointed and delegated authority to identified leaders (such as CHIA), and those loosely-structured groups which have opted to proceed without any formal leadership, but instead to proceed as a "committee of the whole." Does a lawyer meeting with the full group have differing responsibilities depending on whether the group has appointed a leader or leaders? The answer to that question seems to be no, based upon an application of conventional agency law. The membership in this puzzle represents the principal; the appointed leaders represent direct agents of the principal, authorized to speak on behalf of the principal; and the lawyer represents a *co-agent* (and not a sub-agent), even if selected and appointed by the leadership. *See* HAZARD & HODES, *supra* note 59, at § 17.5, p. 17-16; RESTATEMENT (THIRD) OF AGENCY, *supra* note 89, at 1.01, Cmt. *f*. A communicated instruction between the principal and the co-agent would bind the other co-agent, even if the direct agent disagreed with the instruction. *See id*. For the lawyer's purposes, when meeting with the group as a whole, the agency status of the leaders disappears, and they become, as a matter of agency law at least, simply undifferentiated members of the group. (They may have power within the group, of course, but that is a separate matter.)

group client without the use of constituents, and his analysis is invaluable on this topic.[198] While Ellmann does not articulate a concern about the finite population of the group client, and in particular with the role of members (or purported members) absent from the meeting itself (a topic we discuss in a moment[199]), and while he suggests a provocative tactic involving individual meetings between the lawyer and the members[200] (which we also address below[201]), his assessment of the counseling process is quite insightful for our purposes. Comparing that interaction with the conventional Binder & Price model of client counseling, Ellmann notes that the exploration with the client about goals and what he calls the client's "values"[202] has to be different when working in a meeting of many individuals who likely do not share the same preferences and risk gauges. His wise conclusion is that the lawyer must be much more general and vague about that topic compared to the work a lawyer would engage in with an individual client.[203] The traditional Binder & Price counseling model suggests that the lawyer explore with her client in some detail the client's goals and preferences as a necessary precursor to effective counseling.[204] Ellmann observes that such a step is more challenging and likely to be less effective when working with a larger group.[205]

Recognizing that difference, would a lawyer such as Kendra organize her counseling session in any different way if she were meeting with the CHIA client group as a whole? Recall the standard Binder & Price protocol outlined earlier.[206] Aside from managing the group process (to be addressed in a moment), there is little reason to believe that Kendra would orchestrate the meeting in any different way. She would not rely on the group to decide which alternative to discuss first,[207] but otherwise she would explain each option first descrip-

[198] Ellmann, *supra* note 11, at *passim*.

[199] *See* text accompanying notes 207-14 *infra*.

[200] Ellmann, *supra* note 11, at 1152 and n. 129.

[201] *See* text accompanying notes 213-14 *infra*.

[202] Ellmann, *supra* note 11, at 1167. Recall this work's discomfort with the use of that term to capture the idiosyncrasies of an individual client's leanings and preferences. *See* text accompanying note 43 *supra*.

[203] Ellmann, *supra* note 11, at 1140-41 ("[T]he goal of discussion must become the eliciting of the major concerns of the group's thinking, rather than the detailed variations.").

[204] *See* LAWYERS AS COUNSELORS, *supra* note 13, at 302-04; *see also* COCHRAN, DIPIPPA & PETERS, *supra* note 19, at 148-49 (similar suggestion).

[205] Ellmann, *supra* note 11, at 1141 n. 103 ("[T]he task of identifying the pertinent or material issues with a group seems bound to call for more limited attention to the details of each individual member's situation than a client-centered lawyer would provide to those members one-on-one.").

[206] *See* text accompanying notes 43-49 *supra*.

[207] *See* LAWYERS AS COUNSELORS, *supra* note 13, at 300-02 (recommending such a tactic to bolster the lawyer's neutral approach); COCHRAN, DIPIPPA & PETERS, *supra* note 19, at

tively, and then normatively, examining the advantages and disadvantages of each in as disciplined a way as possible to clarify the nature of the choice before the client.[208] While it is obviously true that some of the group members may perceive a certain factor as a "pro" while others may view that very same factor as a "con," that reality is neither problematic nor is it all that different from what happens when a lawyer counsels an individual client.[209] Once the client understands, as best as the lawyer can achieve, the considerations, the "client" must then decide, and the lawyer will follow the client's self-determined decision.

Therefore, it appears that a lawyer such as Kendra would not counsel her group client in any appreciably different fashion when working with the group as a whole, compared to her meeting with an individual client. But while the organizational structure may look much like the conventional model, there are two ways in which Kendra's work will require some special consideration when her counseling involves the group as a whole. The first of these concerns how Kendra manages the group dynamics of the meeting, and whether how she does so matters. The second concern is how deferential, or interventionist, Kendra ought to be when the group deliberates, compared to her work with individuals and with a well-structured group. Let us consider each in turn. As we do so, we see that Stephen Ellmann's observations are very useful, even if we depart from his conclusions in some fashion.

Ellmann views the problem of the group dynamics, and the participatory quality of the deliberations, as a central concern for the law-

14-15 (noting, and criticizing, lawyers' control tactic by choosing which alternative to discuss first).

[208] LAWYERS AS COUNSELORS, *supra* note 13, at 311-12.

[209] The basic Binder & Price model is premised on the moral commitment to encourage the client's preferences to determine how the legal matter will proceed. The lawyer does not, by and large, label a factor as good or bad; the lawyer describes the factors and elicits from her client the normative appreciation for that factor. *See id.*, at 300-01. With a group client, it *appears* that the elegance of that model's reasoning falters, because the same client will see a given factor as simultaneously good (some members' view) and bad (other members' view). From the lawyer's perspective, this need not be a problem and does not interfere with the lawyer's mission. The diverging perspectives, if arrived at in good faith and with respect, are exactly what a good deliberative process needs to discern the group's settled sentiment in the end. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 151 (2006) (describing the benefits of pluralism and research showing that dissent contributes to better decisionmaking; *citing* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 27 (2003)). And, frankly, the divergence of normative reaction is not unusual in the case of individual clients either. It is common for a client to perceive both disadvantages and advantages in the same factor, and feel torn as a result. *See, e.g.,* LAWYERS AS COUNSELORS, *supra* note 13, at 371-79 (describing clients experiencing difficulty deciding); LEHRER, *supra* note 28, at 199 ("Even the most mundane decisions emerge from a vigorous cortical debate.").

yer working with a loosely-structured group client.[210] He asserts that the lawyer has an obligation to "assur[e] a baseline of democratic and participative process within the group,"[211] even if doing so might be understood as an exercise in benevolent paternalism.[212] To Ellmann, that means intervening in the group meeting to insure that those members who may be less vocal, or who may be intimidated by the group's leadership, have an opportunity to be heard.[213] He even suggests that the lawyer "might . . . make plain to each member of the group that she is always available to talk to any one of them *individually and in private*."[214] In this way, he argues, the lawyer can best serve her group client by fostering participatory, democratic decisionmaking.

Ellmann's observations trigger intriguing questions about the responsibilities of a lawyer for a loosely-structured group. While Ellmann's subject is explicitly community group representation,[215] his arguments raise important questions about group representation generally. Despite the power of his recommendations, it is difficult to accept them as best practices principles for group work outside of the community group setting.

Ellmann's insistence that a lawyer for an entity foster democratic and participatory processes for the client's deliberation seems to conflate the understanding of the lawyer for an aggregate of clients and that of the lawyer for an entity. Putting aside the difficulty with his quoted activist lawyer telling her group client members that she represents them individually, and not just the group's leadership,[216] the pre-

---

210 Ellmann, *supra* note 11, at 1131-32.

211 *Id.* at 1145.

212 *Id.* at 1146 n. 113.

213 *Id.* at 1152. Ellmann refers to the silent group members as "victims within the group itself." *Id.*

214 *Id.* (emphasis added). Ellmann describes a practicing lawyer's sentiments in support of this recommendation: "[The lawyer] wants the individual members to know 'that though I'm representing the group, the group is composed of individuals, and *I'm representing each individual* . . . and not, say, just the [group's] leaders.'" *Id.* (emphasis added) (quoting Ellmann's private interview with attorney Judith Whiting).

215 *Id*. at 1104 (describing his context as "public interest lawyers' representation of groups," which I infer to refer to community groups).

216 *See* text accompanying note 214 *supra*. The quote from Judith Whiting captures a sentiment which is at once understandable and, well, wrong as a matter of substantive law. Assuming (as seems to be the case given Ellmann's purposes in situating her quote) that she has opted for entity representation (under Rule 1.13) and not joint representation (under Rule 1.7), Whiting does not represent the individuals, just as she does not represent the leadership. Her desire to communicate to the rank and file of the community group the sense that she has no special allegiance to the leadership but instead has a commitment to the larger group is admirable, given the former's potential distrust of the group's hierarchy. But to say that she does not have a special representational relationship with the leadership is problematic, given the strictures of Rule 1.13. *See* MODEL RULES, *supra* note

mise of the lawyer advising each constituent individually is difficult to square with the underlying conception of entity, rather than aggregate, representation. If we assume that Ellmann's lawyer would warn each such individual group member appropriately of the lawyer's fiduciary obligations toward the group as a whole and not to that individual, as Rule 1.13(f) requires,[217] the arrangement he proposes only seems to work if the group as an entity has agreed to that process for its decisionmaking. If Ellmann is advocating that the lawyer suggest such an arrangement on behalf of the group client, his argument is difficult to square with the usual commitment to client autonomy.[218]

As above, let us return to our CHIA example to assist us to understand better the tensions Ellmann's proposal evokes. We envisioned above a legal development which led Kendra to choose to meet with the CHIA members as a group, including of course their appointed leaders Maritza, Sharon and Frank.[219] Imagine, then, the following: During the meeting of the seventeen homeowners, Kendra carefully outlines for the group the choices available to it (go to the press and risk ending negotiations or holding off on that tactic and hoping for a breakthrough of the current deadlock), and orchestrates a comparative discussion of the alternatives, with a goal of discerning the group's ultimate choice. The three leaders, Maritza, Sharon and

52, at R. 1.13(a). Whiting's obligation as a lawyer would be to honor the wishes of the leadership if, in fact, the leadership served as the proxy for the group. *See* FOX & MARTYN, *supra* note 128, at 76.

217 *See* MODEL RULES, *supra* note 52, at R.1.13(f) (requiring clarification to constituents who might misunderstand the lawyer's role); ROTUNDA & DZIENKOWSKI, *supra* note 70, at § 1.13-3, p. 575 (comparing the clarification duties to "Miranda" warnings); *see also* RESTATEMENT, *supra* note 50, at § 103, Cmt. *e* (describing the duty to clarify).

218 *See* Diamond & O'Toole, *supra* note 2, at 520-21 (disagreeing with Ellmann on the issue of the commitment to democratic processes, noting that some groups may flourish without that quality). Ellmann does not miss the prospect of irony in his combining a deep commitment to autonomy with a suggestion that a lawyer urge a client group to be democratic and protective of the interests of the less vocal members. Indeed, it is his express effort to accommodate a commitment to individual autonomy and group autonomy that leads Ellmann to his advocacy of intervention to encourage democratic processes. *See* Ellmann, *supra* note 11, at 1132-33.

219 *See* text accompanying notes 163-64 *supra*. It is difficult to imagine this meeting without commenting upon two peripheral issues which a lawyer in Kendra's position often would confront. The first is the prospect that only fifteen, say (or some number larger than nine), of the seventeen group members attend the meeting. While most lawyers would proceed to counsel this significant subgroup of the whole, and treat its decisionmaking as reliable and binding, the absence of some members raises certain conceptual difficulties for the lawyer's authority scheme. The second issue concerns the presence of the three appointed leaders, Maritza, Sharon and Frank, at the meeting. Because of the absence of a formal structure within CHIA for appointed agents (even if we assume that the group has anointed the three to serve as its spokespersons in their work with the group's lawyer), the lawyer would likely ignore, for this meeting's purposes, the leadership authority of Maritza, Sharon and Frank, except insofar as they emerge as "organic" leaders during the discussion and deliberation (which, again, seems likely).

Frank, are quite active during the discussion. Four other members participate almost as much as the three leaders. A few other homeowners participate on occasion, and five members say nothing of substance, but appear to be engaged in the arguments and colloquies. After ninety minutes of talk and debate, the group agrees, by consensus (and not by vote), to call the nuisance-creator's bluff and to instruct Kendra to go to the press with their concerns—the higher risk option, in Kendra's opinion.

As a matter of best practices, may we concluded that Kendra has performed satisfactorily in her role as CHIA's lawyer? Note that she did not meet with any of the homeowners individually or in private. She did not intentionally call upon the five silent members to elicit their views. She did not ask for a vote. She leaves the meeting knowing that it is possible that some members of CHIA would have chosen a different option if it were solely their choice. Do these factors imply some professional negligence on her part?

Ellmann's thesis implies that Kendra has breached a duty to some of the individuals, but the thin story just described evidences, it seems, very good lawyering on Kendra's part. Her work with the group accepted the organic dynamics of the group itself, and respected the rights of the members to speak or not to speak, to dissent or not to dissent, all while maintaining her allegiance to the group *qua* group, and not as an aggregate of individual clients.[220] This thin story in fact suggests some dangers of a stance that would seek to protect expressly the autonomy of the less active group members by separating them from the group and encouraging a different kind of input from them. A commitment by Kendra to encourage a deliberation not dominated by the seven most vocal members, and one that required participation by the less vocal, risks changing the group's organic deliberative process, and possibly distorting it.

Before moving to the second issue identified above, regarding how deferential Kendra ought to be about the results of the group's deliberation, we must address a common variation of the topic we have just covered. The thin CHIA story described a somewhat typical group meeting, with some members far more active and opinionated than others, but one in which the veneer of consensus (and perhaps true consensus) emerged in the end. Similarly typical, though, is a story with factions within the entity. We cannot end our consideration of the lawyer's responsibility for loosely-structured, group-as-a-whole decisionmaking without engaging the question of an entity divided internally.

[220] *See* FOX & MARTYN, *supra* note 128, at 263-64; ABA Comm. on Ethics & Prof'l Resp., Formal Op. 92-365 (1992).

The faction question is much more difficult for a loosely-structured group like CHIA. With a well-structured group, factions will occur, of course, but the formal structures in place usually permit the lawyer to honor the preexisting authority routes and, to some extent, observe the faction disputes from a safe distance.[221] An unincorporated association without such formal structures offers the lawyer fewer safe harbors. Let us consider some possible avenues for a lawyer in that setting.

Consider, then, this variation of the thin story just described. Imagine that at the community meeting of the seventeen homeowners, a profound chasm emerges between two groups of homeowners. The three leaders and five other members urge the high risk option of publicity, while the remaining nine members oppose that strategy adamantly. Kendra, for whatever significance this has, favors a more moderate approach, concluding that the ultimatum idea is premature. As a lawyer representing CHIA, Kendra must assess how she should navigate this internal disagreement, and how she should interact with the membership at the meeting (and thereafter, if the disagreement persists). Because CHIA is an informal group without by-laws or an established hierarchical authority scheme, Kendra cannot simply defer to previously agreed-upon default decisionmaking arrangements.

This example—which is not entirely implausible, of course—highlights the need for Kendra to have clarified her role with the unincorporated association as she began her representation. CHIA is a voluntary organization, and its members are free to leave.[222] By

[221] This Pollyanna-ish description obviously downplays considerably the tensions a lawyer faces when reporting to management engaged in an intra-company squabble. The central point, though, seems well-supported—in a formal corporate or LLC setting, the lawyer may rely on rules and schemes agreed to in more auspicious days, and honor the hierarchies set out in the corporate documents. If lawyers find it difficult in those settings, a lawyer encountering a similar squabble in a loosely-structured unincorporated association will find her professional role tensions to be all that much more challenging. *See, e.g.,* Simon, *Intraclient Conflict*, *supra* note 85, at 61-65 (describing the difficulties in corporate settings generally). Of course, lawyers in close corporations and small partnerships face tensions very much like those in an unincorporated association. For a discussion of the close corporation and partnership role tensions, see *id.*; FOX & MARTYN, *supra* note 128, at 230-35; James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 PAC. L.J. 961 (1995); ABA Comm. on Ethics & Prof'l Resp., Formal Op. 91-361 (1991) (partnership representation).

[222] Community lawyering scholarship often highlights the fluid nature of group membership. *See, e.g.*, Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 343-44 (2009) (describing "clients in community, as bound together by economic and social conditions"); Diamond, *supra* note 1, at 69-72 ("extemporaneous" groups have fluid membership"); Zenobia Lai & Andrew Leong, *From the Community Lawyers' Lens: The Case of the "Quincy 4" and Challenges to Securing Civil Rights for Asian Americans*, 15 ASIAN AM. L.J. 73, 114 (2008) (fluid membership of a community group).

agreeing to represent CHIA as an entity, Kendra and the homeowners need to be certain about what "CHIA" means if, say, nine of its seventeen members opt to depart the organization. If Kendra has clarity about that, then she may follow the prescribed agreement. The more challenging question is what Kendra ought to do if that happenstance has not been anticipated and the participants have not agreed in advance about how she will proceed.

It appears that Kendra's only options are to clarify the nature of the disagreements among the constituents of CHIA, attempt to mediate a resolution among the homeowners and, if no such resolution emerges, to withdraw as counsel for the organization.[223] Does she have professional discretion to take these steps? She certainly has discretion, and likely an obligation, to clarify the nature of the internal disagreements. That mission represents her central role as counselor for the loosely-structured organization. The mediation option is also likely a permissible tactic for Kendra, but it is not entirely self-evident why this is so.[224] While the Model Rules formerly recognized "intermediation" among clients as an available role for a lawyer, through what was known as Model Rule 2.2,[225] the American Bar Association's Ethics 2000 Commission successfully recommended the repeal of Rule 2.2.[226] The Commission did not urge the repeal of the rule because of any sentiment that intermediation among clients was forbidden to lawyers; instead, the Commission understood that any mediation-type activity ought to be understood as a version of joint representation and encompassed within the standard conflict of interest rule, Model Rule 1.7.[227] Thus, prevailing substantive law under-

[223] "If neither the governing documents nor the applicable law provides guidance as to who has the authority to direct the lawyer's actions, and the internal dispute remains irresolvable so that continued representation of the organization becomes unreasonably difficult, the lawyer's only recourse may be to withdraw." *Client Identity*, Laws. Man. on Prof. Conduct (ABA/BNA) 91:2001 (2004), *citing* California State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1994-137 (1994), 1994 WL 654491 (Cal. St. Bar. Comm. Prof. Resp.). This authority states that a lawyer "may" have to withdraw, but it does not address any other alternative available to the lawyer.

[224] Ellmann recommends mediation in the case of factions within a community group. *See* Ellmann, *supra* note 11, at 1155.

[225] *See* MODEL RULES, *supra* note 52, at R. 2.2 (repealed in 2002). Ellmann, writing in 1998, disagrees with a reliance upon Rule 2.2 as a basis under which to represent a group client, for reasons developed in the text. He does, though, agree that in the case of group factionalism the lawyer may act as mediator within the group. *See* Ellmann, *supra* note 11, at 1155.

[226] *See* AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 401-02 (2006).

[227] *Id.*; *see also* Bennett, *Creating a Client Consortium*, *supra* note 9, at 83-85; Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to be Governed by a New Law*, 45 BRANDEIS L.J. 755, 777 and n.89 (2007) (discussing intermediation among constituents of partnerships and LLCs).

stands that a lawyer may mediate among her clients with proper waivers in place.[228]

The difficulty in our applying the Rule 2.2 sentiment (via Rule 1.7) to Kendra is that she is not mediating among her several clients as the rule contemplated; she does not represent any of the seventeen homeowners. Kendra, therefore, needs to understand her role from a perspective other than the former Rule 2.2 or the current Rule 1.7. She must understand her role as "corporate" counsel to include mediation among the "corporate" constituents. When working with an unincorporated association, especially an association such as CHIA without elaborate processes in place for managing internal disagreement, a lawyer must be able to play such a role, and no available substantive law authority exists to prohibit it. While it may be true that within a formal corporate environment a lawyer would not have the authority, absent a specific request from the executive with the power to do so, to work with the rank and file constituents to resolve their disputes with management,[229] that limitation does not seem to apply to a lawyer meeting with the entire membership of a loosely-structured group client. If Rule 1.6 creates the practical limit on the corporate lawyer's ability to deal with rank and file constituents,[230] the group-as-a-whole meeting setting offers to Kendra at least implicit permission from her client to disclose protected information to the non-client constituents.[231]

---

[228] The former Rule 2.2 permitted intermediation only with the consent of each affected client after each understood the risks and benefits of the alternative lawyering stance which intermediation represents. MODEL RULES, *supra* note 52, at R. 2.2 and Cmt. 8 (1999 version).

[229] As Larry Fox and Susan Martyn point out, a corporate lawyer does not have implicit authority to discuss corporate matters with constituents, if only because of the restraints of Model Rule 1.6 and the limits of the lawyer's ability to discuss client matters with a non-client. *See* FOX & MARTYN, *supra* note 128, at 16-17, 70-71; MODEL RULES, *supra* note 52, at R. 1.6. *Cf*. Bell v. Clark, 670 N.E.2d 1290 (Ind. 1996) (no duty of lawyer to inform limited partners of developments because no attorney-client relationship with them); Mary F. Radford, *Ethical Challenges in Representing Families in Family Limited Partnerships*, 35 ACTEC J. 2, 22 (2009) (noting a 1.6 issue when a limited partner seeks information from partnership's lawyer).

[230] In fact, the corporate lawyer's limitations come not just from the confidentiality obligations but also from the lawyer's fiduciary responsibility not to take actions without permission, implicit or explicit, from the client. *See* FOX & MARTYN, *supra* note 128, at 16-17.

[231] For implied permission to disclose protected information, see MODEL RULES, *supra* note 52, at R. 1.6(a) and Cmt. 5. The nature of Kendra's confidentiality obligation to her client CHIA is itself an intriguing consideration, one which yet again reminds us of the need for a lawyer such as Kendra to establish clear protocols and authority schemes when working with a loosely-structured group. With a well-structured group, its lawyer may not reveal information related to the representation to constituents without permission (explicit or implicit) from the management figure with authority to give such permission. *See* RESTATEMENT, *supra* note 50, at §96. Absent such permission, a lawyer will have violated Rule 1.6 and breached her fiduciary duty to her client. In the case of a loosely-structured

With permission in place to talk freely about client matters in front of the constituents, no other role limitation would preclude Kendra from mediating among those constituents, and some authority supports her responsibility to do so.[232] Ellmann suggests that when engaged in that mediation the lawyer take pains not to be identified as supporting one faction over the other,[233] while Diamond and O'Toole see that happenstance as often inevitable and not necessarily a bad thing.[234] The underlying commitments of the Binder & Price counseling model tend to confirm Ellmann's worry about the lawyer's expressing her support for one bloc at the expense of another.[235] But those commitments, as we have seen, have less clout in the organizational context. The mandate within Rule 1.13 that the organizational lawyer attend to "the best interest of the organization"[236] informs the lawyer's duty to be a neutral, objective analyst, and might at times require her to resist the arguments of some subsection of the membership and to advocate the views of others.[237] In the example of the CHIA fac-

group such as CHIA, Kendra might see the group's appointed leaders, Maritza, Sharon and Frank, as the management figures possessing such authority, but without knowing more, Kendra may not be certain that the three leaders' authority includes that subject as well. (Indeed, it is entirely possible that no one in the homeowners' group thought very much about that topic when appointing Maritza, Sharon and Frank to be the group liaison to its lawyer.) In light of that ambiguity, Kendra would have to exercise her best judgment, discerned from group cues, about the implied authority she possesses to divulge information when necessary on the group client's behalf (such as, for instance, when negotiating with the nuisance-creator). In the context of the group-wide meeting that the text has been discussing, the implicit permission to talk about client matters before the client constituents seems quite reliable.

[232] *See* HAZARD & HODES, *supra* note 59, at § 17.5 ("when a deep division of opinion arises within the entity that threatens its well-being or even its survival, . . . the lawyer may have to take action within the organization to resolve this matter, because this is in the best interest of the organization") (citing MODEL RULES, *supra* note 52, at R. 1.13 for the duty to act in the "best interests of the organization"). Diamond & O'Toole criticize the Hazard & Hodes position for assuming in too facile a matter that the organization's survival is always in its best interest. *See* Diamond & O'Toole, *supra* note 2, at 525.

[233] Ellmann, *supra* note 11, at 1160-61.

[234] Diamond & O'Toole, *supra* note 2, at 527-28.

[235] While Ellmann articulates a strong allegiance to a presumptively neutral stance on the part of the lawyer representing the group client, *see* Ellmann, *supra* note 11, at 1106, his objection to the lawyer's siding openly with one faction stems more from his worry about the effect on the group's functioning, and on the feelings of the members of the less-favored faction, that the lawyer's stance would trigger. *Id.* at 1165-66.

[236] MODEL RULES, *supra* note 52, at R. 1.13(b).

[237] *Cf.* COCHRAN, ET AL., *supra* note 19, at 12 (discussing the worrisome fact that corporate clients control lawyers, and suggesting a more active role for corporate counsel compared to lawyers representing individuals); Laws. Man. on Prof. Conduct (ABA/BNA) 91:2001 (2004) ("The corporation's lawyer must avoid the trap of inevitably equating the will of the majority with the corporation's interest. To do so runs counter to the bedrock premise that the corporation is distinct from its owners and managers."). *But see id.* ("The lawyer faced with internecine conflict must remain neutral and refrain from taking sides in factional differences.").

tions, though, there seems little reason for Kendra to consider siding with either of the two blocs within the unincorporated association.[238]

The third option identified above as available to the lawyer when confronted with deep divisions within her loosely-structured group was to withdraw from the group representation. Kendra has discretion to do so if she concludes that the division within the group renders her representation "unavoidably difficult."[239] She will recognize, though, that her withdrawal as counsel would likely mean the effective end of CHIA as an unincorporated association operating as an entity.[240] That may be an inevitable development, but it ought to give Kendra pause just the same.[241]

We are nearing the end of our examination of the lawyer's responsibilities when counseling a loosely-structured group client. We have one final topic awaiting us: What level of deference ought the lawyer pay to the group's deliberation? Put another way, how interventionist may the lawyer be when counseling the group as a whole? This question emerges from the context of our earlier discussions about neutrality and directiveness. We recognized the baseline moral commitment to neutrality when working with an individual client, out of respect for the individual client's personal preferences and risk aversion.[242] We then concluded that the moral calculus changes when the lawyer counsels a constituent of an entity client, with even

[238] If we accept that Kendra might have the responsibility in some contexts to support one faction in an internecine organizational battle if, in her judgment, the best interests of the organization so require, that precondition does not apply to the hypothetical disagreement we have created for CHIA. As we have seen, both of the options available to CHIA are lawful and permitted; they differ only in the level of risk assigned to each. It would be unusual for a lawyer to intervene in that kind of client decision, whether individual or corporate. In many ways, the choice of strategy *vis-à-vis* the nuisance creator resembles a business decision, which corporate lawyers are taught to respect and for which they defer to management. *See, e.g.,* FOX & MARTYN, *supra* note 128, at 16.

[239] MODEL RULES, *supra* note 52, at R. 1.16(b)(5). *See also* California State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1994-137 (1994), 1994 WL 654491 (Cal. St. Bar. Comm. Prof. Resp.).

[240] This is a practical consideration, not a legal one. If Kendra concludes that the group is irrevocably split, so much so that there is no consensus on which she can rely for her legal work on its behalf, she may of course invoke Rule 1.16 and end the representation. But that leaves the seventeen homeowners without entity counsel, and unlikely to agree on an avenue for retaining new counsel. Our hypothetical is too thin to speculate whether the relief sought by the homeowners may be obtained by members of CHIA pursuing their remedies separately; if so, CHIA may end but the homeowners may abate the nuisance through less coordinated means. For a discussion of this kind of internal struggle, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

[241] *See* Diamond & O'Toole, *supra* note 2, at 521-25 (discouraging withdrawal for its effect of denying the splintered group the benefit of the lawyer's experience with the group and her wisdom about its mission).

[242] *See* text accompanying notes 26-27 *supra*.

less deference due when the constituent represents a loosely-structured group or unincorporated association.[243] Critical to the moral analysis was the recognition that the constituent, the person speaking with the lawyer, was not the client whose preferences need to be respected and only possessed a presumptive right to express the entity client's preferences and comfort level with risk. The fact that the constituent was at best an imperfect proxy for the true client served as a morally relevant consideration in discerning the responsibility of the lawyer during the counseling process.

When the lawyer counsels the group as a whole, the moral calculus changes again. The setting now resembles far more closely that of a lawyer with her individual client. The morally germane proxy element is now gone, and the group's choice—putting aside, for now, any consideration of its being a "community group" with whatever added commitments that designation might imply—accurately represents the client's wishes. Note that this is a separate question from that of how the lawyer *discerns* the group's wishes, a matter we encountered above. But once discerned, or in the process of its development, the lawyer has little moral right to influence its direction.

Ellmann's review of the group counseling process concurs with this conclusion.[244] His arguments rest not only on the fact that the client as a whole is expressing its preferences,[245] but upon a more subtle realization as well, one that serves as a contrast to, rather than a similarity with, individual client counseling. With an individual client, once the lawyer understands the client's needs, preferences and comfort with risk, the lawyer might engage the client in a relatively active and even challenging fashion to account for any perceived disconnect between the strategy chosen by the client and the expressed commitments.[246] When working with a group client, Ellmann notes, the law-

[243] *See* text accompanying notes 96-106 *supra*.

[244] Ellmann, *supra* note 11, at 1164.

[245] Recall that Ellmann's analysis of group client decisionmaking treats the default orientation as a lawyer working with a group as a whole, rather than the default orientation adopted in this Article, which assumes that any functioning group client will need to have some rudimentary bureaucratic structure in place, and therefore the lawyer will work most often with constituent/leaders. Recall also the Diamond and O'Toole observation that most community groups will not be, and ought not be, "bureaucratic" groups as this Article suggests. *See* Diamond & O'Toole, *supra* note 2, at 514-15. For reasons developed throughout this article, that sanguine stance on the part of O'Toole and Diamond, while admirable, cannot square with the demands of the law of lawyering.

[246] *See, e.g.,* LAWYERS AS COUNSELORS, *supra* note 13, at 368-69; KRIEGER & NEWMANN, *supra* note 19, at 273-74; COCHRAN, DIPIPPA & PETERS, *supra* note 19, at 155. The lawyer has no obligation to insist that the client choose the strategic option which best comports with the client's expressed preferences and penchants, of course, or to influence the client to do so. The client's actual choice may express those preferences more soundly

yer can never be confident enough about the group's commitments, preferences, and risk comfort, precisely because the group members will have a multitude of opinions and differing feelings. Lacking a sufficiently full understanding of the client's true commitments, the most effective role for the lawyer might be to oversee the decision-making *process* within the group to ensure that the membership's decisions are fair and coherent.[247] The lawyer, by this reasoning, would have little or no responsibility for the *content* of the group's decisions.

Two considerations might diminish the power of this conclusion, however. The first is equally applicable to a lawyer's work with an individual client. Most observers agree that lawyers bear some responsibility for the moral consequences of the work they perform for and with their clients.[248] The second consideration applies to organizational clients. As Richard Painter notes, because of the nature of entity clients operating through constituents, the relationship between the group's decisionmaking and the lawyer's input is quite "interdependent."[249] In Painter's words,

> [D]ebate over the relative merits of lawyer and client autonomy may be moot. Corporations are not autonomous, but rather corporate decisions are made by people standing behind the corporate entities: directors, officers, employees, and lawyers. Lawyers' choice is not whether to participate in making clients' decisions, but what type of participation theirs will be.[250]

than the client's *ex ante* articulation of them. *See* LEHRER, *supra* note 28, at 232-38; Kruse, *Fortress in the Sand*, *supra* note 24, at 422-23. But nor should the lawyer ignore an apparent inconsistency between what the client professes to want and what the client then chooses. *See* LAWYERS AS COUNSELORS, at 398-99.

[247] Ellmann, *supra* note 11, at 1164 ('the role of [the lawyer's] advice frequently may be more to inform further debate than to bring the [group] client to a quick resolution of uncertainty").

[248] A widely accepted exception to the standard conception of the lawyer's respecting client decisionmaking is when the client chooses an unlawful or an immoral course of action. In that setting, a lawyer has the responsibility to intervene, and that intervention, of course, is not an exercise in paternalism. *See, e.g.,* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 160-74 (1988); Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 42 (Deborah L. Rhode ed., 2000); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317 (2006). *See also* LAWYERS AS COUNSELORS, *supra* note 13, at 391-93 (counseling clients about moral issues).

[249] Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994).

[250] *Id.* at 517. Many observers agree, both in the conventional corporate arena, *see, e.g.*, Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615 (2006) [hereinafter, Langevoort, *Good Corporate Lawyering*], and in the community lawyering context, *see, e.g.*, Diamond & O'Toole, *supra* note 2.

## IV. Counseling Community Group Clients

To appreciate adequately the counseling responsibilities for lawyers working with community groups, our preliminary aim has been to unpack those responsibilities as they apply to *group* clients generally. We have seen so far that a lawyer representing a group client must attend to a number of important strategic and ethical considerations. To complete our mission, we now inquire about the further special responsibilities, if any there are, for lawyers whose group clients are *community groups*.

This part concludes that the *community* quality matters. Once we articulate what we mean by the term "community group," we will see that a lawyer for such a group will find her role altered in three possible ways. First, because most community groups share (and often expressly commit to) a public mission, its counsel might assume responsibilities different from lawyers representing clients, whether group or individual, whose mission is principally private. Second, when representing a community group, including one that retains a private mission, a lawyer might need to attend in a different way to the oppression and structural power deficits of the group's members. Finally, and related to the second point but seemingly a different manner, a community group counsel might respond to her group client's experience of oppression in ways which appear less neutral and less deferential, in an effort to establish more favorable conditions for its members' eventual autonomy development. As the discussion below will show, these three observations are each quite tentative and contested. We begin, however, with the preliminary definitional question.

### *A. Defining "Community Groups"*

For purposes of this discussion, we may consider a group client to constitute a "community group" if its members are economically and politically powerless and have joined together for collective aims related in some way to their plight of powerlessness.[251] This definition encompasses all kinds of underrepresented and oppressed groups. The counsel for the community groups most likely will be in some fashion "public interest" lawyers[252] (including law firm lawyers serv-

[251] *See, e.g.,* Bennett, *Little Engines that Could*, *supra* note 1, at 472; Diamond & O'Toole, *supra* note 2, at 483; Richard G. Lorenz, *Good Fences Make Bad Neighbors*, 33 Urb. Law. 45, 79 (2001) (noting the powerlessness of community groups) (citing Laurence Susskind et al., Negotiating Environmental Agreements: How to Avoid Escalating Confrontation, Needless Costs, and Unnecessary Litigation 17, 21 (2000)).

[252] *See* Ellmann, *supra* note 11, at 1105 (focusing on public interest lawyers, whom he describes as "lawyers whose work is aimed at achieving social reform on behalf of people who would otherwise lack adequate representation").

ing in a pro bono capacity[253]), but not necessarily so, as some groups fitting this description will hire private counsel for its legal work. For our purposes, it does not matter whether the lawyers whose work this part addresses are privately paid or publicly- or foundation-funded.

The definition here excludes, of course, most purely private groups which have banded together for private gain. While the earlier discussion of group representation applied equally well to profit-driven business entities and activist civic organizations, this discussion excludes the former organizations. Some groups banding together for private gain will fit within the definition, though, such as a low-income tenants' association[254] or even some merchants associations.[255] The critical question is whether the membership consists of those without a fair share of economic or political power, and whether the aims of the group include some increased share of assets, wealth, or power. The definition used here easily includes the client groups which are the subject of the community lawyering literature.[256]

The definition articulated here elides many rich and fascinating debates within the community lawyering scholarship. At least for definitional purposes, it does not matter whether the community group is "representative" of the community for whom it purports to speak.[257] (That factor may matter, however, for some parts of our consideration of the lawyer's responsibilities.) Nor does it matter for our purposes what we define as a relevant "community"—whether a geographic lo-

[253] *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1 (2004); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 Fordham Urb. L.J. 603, 621 (2009).

[254] *See, e.g.,* Diamond & O'Toole, *supra* note 2, at 490-91 (describing a building-wide group of tenants as a community group).

[255] *See* Bennett, *Little Engines that Could*, *supra* note 1, at 472 (noting that most merchant associations do not qualify as public charities despite their connection to community economic development). Several civic improvement organizations with "Main Streets Program"-related missions have qualified for 501(c)(3) status. *See, e.g.,* Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. Colo. L. Rev. 137, 175 (2008) (describing neighborhood councils organized as 501(c)(3) entities), *citing* Jeffrey M. Berry et al., The Rebirth of Urban Democracy 58-59 (1993); Treas. Reg. § 1.501(c)(3)-1(d)(2) (2004) (the term "charitable" includes "promotion of social welfare by organizations designed to accomplish [such] purposes . . . [as] (i) to lessen neighborhood tensions; . . . or (iv) to combat community deterioration").

[256] For a sampling of that literature discussing the types of groups described here, see Alfieri, *(Un)Covering Identity*, *supra* note 97, at 831; Diamond, *supra* note 1, at 75; Ellmann, *supra* note 11, at 1111; Marshall, *supra* note 1, at 173; Rubenstein, *supra* note 240; Seielstad, *supra* note 5, at 449; Daniel Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 Clinical L. Rev. 217, 233 (1999); White, *Facing South*, *supra* note 3, at 814.

[257] *See* Bennett, *Little Engines that Could*, *supra* note 1, at 474 (discussing that tension in her clinical work).

cale or some other basis to apply that term.[258] The definition chosen here applies regardless of where one comes out on that issue.

With this understanding of a "community group," let us now investigate the role responsibilities for the counsel for such a group, building upon the previous development of group representation duties generally.

### *B. Counseling Groups with a Public Mission*

Most (although clearly not all) community groups possess a public mission. For such a client, its membership has formed the entity[259] in order to attain some benefits beyond those of the individual entity's formal constituents. Many of those groups will have made their public missions explicit and non-negotiable, by forming a state nonprofit corporation and seeking tax exempt status from the Internal Revenue Service.[260] Not all nonprofits qualify as community groups, of course, and not all community groups qualify as nonprofits, but a significant subset of community groups will fit within this rubric. Let us consider, then, whether the fact of such a public mission affects the counseling strategies of the lawyer for the organization.

Given the analytical and moral premises upon which the previous counseling practices have been constructed—beginning with an individual client, and then comparing that to a constituent of an entity, and to the entity membership as a whole—a lawyer representing a community group client possesses some discretion, and perhaps an obligation, to intervene more actively in the decisionmaking of that client than in any of the previous contexts, in order to ensure the client's faithful pursuit of its public mission. The default commitment to deference and neutrality which characterizes the conventional counseling models rests on a coherent anti-paternalist sentiment, one grounded in deep respect for the autonomy of the private actor clients. The

---

[258] As Nancy Cook has written, the concept of community is "vaguely defined and often only vaguely understood." Nancy Cook, *Looking for Justice on a Two-Way Street*, 20 WASH. U. J.L. & POL'Y 169, 191 (2006). For others who wrestle with this topic, see Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 356 (2008); Brodie, *supra* note 222, at 343-44; John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1937 (1999); Diamond, *supra* note 1, at 113-14; Robin S. Golden, *Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing*, 17 YALE L. & POL'Y REV. 527, 531 (1998).

[259] As the earlier discussion has shown, we must consider all community groups to be a form of "entity," even if the group is a loosely-structured entity. *See* text accompanying notes 123-34 *supra*.

[260] I.R.C. § 501(c)(3) (2006).

notion of respect for a client's "idiosyncrasies"[261] exemplifies that dedication to autonomy. With community groups devoted to an explicit public mission, the autonomy premise weakens considerably, as does the notion of honoring idiosyncrasy.[262]

The idea of a more activist lawyer role in this context garners support not just from the theories upon which counseling best practices are built, but on another public policy argument as well. William Simon, who advocates the more general position that entity lawyers ought to play a more activist role in discerning the most appropriate stance for the organizational client, points out that charitable organizations in particular can benefit from a lawyer's oversight.[263] Simon's point is that, because constituents of a charitable organization may not always be faithful to the charitable purpose of the entity, the lawyer's role ought to incorporate oversight of that commitment and intervention when necessary. He writes, "Given the relative weakness of monitoring [by the IRS or state officials], it is arguable that the professional responsibilities of lawyers are exceptionally important in this sphere."[264]

In light of Simon's public policy argument, it is important to distinguish three counseling contexts for a lawyer representing a nonprofit community group. First, to fit Simon's argument into our analytic fabric, it is not terribly controversial to assert that the lawyer representing a tax-exempt organization may resist her client's constituents' plans when those plans breach the entity's duties under applica-

---

[261] *See* text accompanying notes 26-27 *supra*.

[262] The arguments here intentionally distinguish a client's strategy to achieve *private* gain and a strategy to achieve *public* benefits. Several colleagues remain skeptical about that distinction. The arguments rest on a well-accepted premise within American law that individuals may act rashly or foolishly when their own property is at stake, and when they do so knowingly. That commitment is foundational to the anti-paternalist strain in American law. *See* Spiegel, *supra* note 6, at 74-77; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131-32 (1986). The argument then asserts a well-established converse proposition, holding that none of us may act rashly or foolishly with others' property to which we have been entrusted. *See, e.g.*, Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 333-35 (2002). The distinction, then, seems a sound one.

The difficulty arises from my applying that distinction to organizations. In organizations with shareholders distinct from management, the lawyer's responsibilities approach those I apply to community groups with public missions. *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 756-76 (2005) (acknowledging the traditional commitment to shareholders but advocating a broader duty); Langevoort, *Good Corporate Lawyering*, *supra* note 250, at 1618-20. In smaller, close corporations, the right to act rashly might be more easily understood.

[263] Simon, *Intraclient Conflict*, *supra* note 85, at 112-13. For a discussion of Simon's "Framework of Dealing" approach to entity representation, see text accompanying note 107 *supra*.

[264] *Id.* at 113.

ble IRS guidelines. All counseling models understand that respect for autonomy does not include respect for law-breaking,[265] and it is hard to imagine a best practices protocol which would discourage a lawyer from such resistance with charitable organizations.[266]

Second, to the extent that Simon's suggestion might be seen as applying to entity constituents' rather direct breach of fiduciary responsibility or federal law commitments, the proposal advanced here is broader than that. The intervention and diminished deference supported here are not triggered only by lawlessness. A lawyer representing a community group has discretion to intervene with, and engage, her client constituents about the wisdom of their pursuit of the entity's public mission. Unlike the case with an individual client, a community group lawyer need not be agnostic about issues of civic policy, community needs, or the public interest. It may be true, of course, that a lawyer may lack any such wisdom or expertise in any particular setting, in which case the lawyer would assume a conventional, neutral counseling stance.[267] But nothing in the theory underlying effective counseling strategy requires that neutrality as a matter of course. If the lawyer possesses expertise about the public mission strategy about which the constituents needs to decide, her client is better off having heard the lawyer's opinion.

The third point follows from the second to suggest a critical distinction, one related closely to the observations appearing in the next Subpart. There may exist a tension within the community group rep-

---

[265] *See, e.g.,* LAWYERS AS COUNSELORS, *supra* note 13, at 328-30; KRIEGER & NEWMANN, *supra* note 19, at 277. *See generally,* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in Jurisprudence and the Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

[266] Some prominent law-and-economics scholars may disagree on this score, at least with for-profit organizations beholden to shareholders. Judge Frank Easterbrook and Professor Daniel Fischel famously argue that corporate management has a duty to violate the law when doing so benefits the firm. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 ("[M]anagers not only may but should violate the rules when it is profitable to do so."). For an in-depth critique of the Easterbrook & Fischel position, see GREENFIELD, *supra* note 209, at 73-75. The Easterbrook & Fischel thesis seems to have little applicability to management of a nonprofit organization, of course. That interesting theoretical debate notwithstanding, the substantive law of lawyering generally prohibits lawyer participation in wrongdoing, and certainly permits lawyer resistance of wrongdoing. *See, e.g.,* RESTATEMENT, *supra* note 50, at § 94(2); MODEL RULES, *supra* note 52, at R. 1.2 (lawyer may not assist client in crime or fraud); R. 2.1 (lawyer may counsel a client about moral and prudential considerations); Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers' Responsibility for Client Fraud*, 46 VAND. L. REV. 75 (1993).

[267] For a comparable protocol regarding ethical decisionmaking generally, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that the more reliable a law provision's purposes are, the less responsibility a lawyer possesses for achieving justice, and the less reliable the scheme, the greater the responsibility of the lawyer).

resentation between the most effective pursuit of its public mission and the effectiveness, solidarity, or sustainability of the community group.[268] This tension is likely to arise especially within community groups whose members are poor, less sophisticated, or victims of structural oppression.[269] It is not at all implausible for a lawyer to conclude that her intervention on policy and mission issues adds substantial value to the group's deliberation about those issues. The counseling model outlined here permits such intervention on the "public mission" front, but such intervention may have serious disruptive consequences for the group process and cohesion.[270] A responsible lawyer will exercise her discretion delicately to minimize the latter effect while attempting to achieve the former goal.

### *C. Building Community*

This subpart addresses from a "best practices" perspective a vibrant theme within the community lawyering literature—the responsibility of the counsel for community organizations to foster solidarity within the group, to promote democracy,[271] and to "build community."[272] Tellingly, but not surprisingly, one does not encounter those exhortations in the scholarship about corporate lawyering generally.[273] The question we confront here is whether what we might call

---

[268] I understand this to be the argument proffered by Diamond and O'Toole. *See* Diamond & O'Toole, *supra* note 2, at 482.

[269] This assertion requires delicate clarification, as well as acknowledgement of its tentative quality. To the extent that achievement of certain public policy objectives depends upon expertise, sophistication, and experience, it is neither unfair nor narrow-minded to predict that an educated lawyer is as likely to possess those qualities as persons with less education, sophistication, and experience. Recognizing that, though, does not imply a disrespect for the insights and experience of those community members who have suffered the most as a result of the policies which the group seeks to change. This is a central mission of Gerald López's writing. *See* LÓPEZ, *supra* note 1, at 66-74; *see also*, Anthony Alfieri, *Practicing Community*, *supra* note 2.

[270] *See* Diamond & O'Toole, *supra* note 2, at 483; Shah, *supra* note 256, at 236-40. For a thoughtful assessment of the lawyer's role in working with grass-roots organizations in the Third World, see David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645 (1991).

[271] *See* Bennett, *Little Engines that Could*, *supra* note 1, at 479-82; Lucie White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073, 1076 (1997).

[272] *See* Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J. L. REF. 639 (1994); Seielstad, *supra* note 5.

[273] In some respects, one encounters the opposite sentiments—that corporate clients have so much power as to be dangerous, and so corporate lawyers ought to serve as gatekeepers and monitors. *See, e.g.,* John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403 (2002); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethics Issues*, 58 BUS. LAW. 143 (2002); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB.

for convenience this "empowerment theory"[274] affects in a tangible way the counseling responsibilities of a lawyer representing a community group. Note the difference between this issue and the previous one. This question applies to all community groups, including those which would not qualify for tax-exempt status because the membership aims to produce a form of "private inurement."[275] If the lawyer possesses some special commitments, they will not emerge from the public mission quality of the group client's existence.

It is useful to separate the strands of arguments in place within the empowerment theory claims. One central insight within the empowerment theory is the observation that community lawyers risk reproducing hierarchy and institutionalizing oppression by their habits of defining client needs within narrow legal categories, exploiting legal expertise to minimize the participation of citizens, and otherwise dominating or distorting group processes.[276] That insight is powerful, not terribly in dispute, and, seemingly, addressed conceptually by the strategic and moral considerations central to all of the preceding discussion. In that sense, it is easy to embrace this critical stance. Community lawyers will adopt a respectful and humble posture in their work with their clients.

But do the critics expect more? Consider one possible implication of the empowerment theory stance. Just as powerless group members ought not to be dominated by the professional lawyers in suits, it is similarly true (one might infer) that powerless group members ought not to be dominated by the more vocal and educated lead-

---

POL'Y 195 (2003) (all commenting on that theme in the context of the Enron matter). Many observers perceive the Sarbanes-Oxley scheme as a manifestation of that worry. *See, e.g.,* Robert B. Ahdieh, *From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721 (2005); James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517 (2008); Peter Kostant, *From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and a New Role for Corporate Lawyers*, 52 N.Y.L. SCH. L. REV. 535 (2008); Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1843 (2007).

274 The "empowerment" term is commonly used as a moral commitment of progressive lawyers. *See, e.g.,* Piomelli, *supra* note 1; Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459 (2006); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Shah, *supra* note 256.

275 The Internal Revenue Service will deny tax exempt status to a purported nonprofits if the entity permits "private inurement"—that is, that constituents will receive some private gain from the entity's work. *See* I.R.C. § 501(c)(3) ("no part of the net earnings [may] inure[ ] to the benefit of any private shareholder or individual"); *see* Darryll K. Jones, *The Scintilla of Individual Profit: In Search of Private Inurement and Excess Benefit*, 19 VA. TAX REV. 575 (2000) (examining that factor).

276 *See* Alfieri, *Impoverished Practices*, *supra* note 1, at 2592-95; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 437-42 (2000).

ers within the community.[277] To the extent that corporate law principles applied to the community group setting require the lawyer to honor the instructions of the entity's "duly authorized constituents,"[278] the paradigmatic counseling responsibility of a community group lawyer might serve to "reproduce hierarchy,"[279] even when the lawyer adopts the respectful and humble posture just described. The empowerment theory might suggest to a community lawyer that she resist autocratic leadership (even if "duly authorized") and work more directly with the membership. Indeed, we have seen such suggestions before in the context of group clients generally, and rejected them as inconsistent with the governing ethical regime.[280]

We have now identified what seems to be a tension between the moral obligation of a community lawyer to foster membership power and the legal/ethical obligation that the lawyer respect the hierarchy within the organization. Of course, if leadership is committed to membership empowerment, the tension dissipates. If leadership is unreceptive to active membership involvement (whether for pragmatic or less honorable reasons), the principles we discerned above showing an entity's lawyer having greater discretion to intervene in counseling a constituent would apply here. The persistent critique of the empowerment theory serves a beneficial purpose for the community lawyer, serving as a constant reminder that her mission with her group client is both to respect the instructions of leadership but always with an eye toward increasing the felt stake of the membership in the resulting processes and decisions.

Let us, then, address one further implication of the empowerment theory critique before we move to our final subpart on the community group topic. The previous subpart noted that a lawyer working with a "public mission" community group (such as a recognized nonprofit) possesses both discretion and, at times, an arguable obligation to encourage the entity client to achieve its public mission, even if the constituents of the entity might disagree with the lawyer's proposals. That subpart noted the tension between that interventionist possibility and the empowerment theory stance, since lawyer intervention tends to imply some lawyer control and possible domination.[281] The present discussion regarding the tension between following the wishes of the entity's "duly authorized constituents" and empowering the member-

[277] Diamond & O'Toole recognize this risk. *See* Diamond & O'Toole, *supra* note 2, at 535-36.

[278] MODEL RULES, *supra* note 52, at R. 1.13(a).

[279] Brodie, *supra* note 222, at 375; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, *in* THE POLITICS OF LAW 40, 50 (David Kairys ed., 1982).

[280] *See* text accompanying notes 167-68 *supra*.

[281] *See* text accompanying notes 268-70 *supra*.

ship invites further consideration of the "public mission" posture.

Imagine the following, then: The nonprofit entity's leadership recommends a certain action as the best avenue to achieve its public mission, but (as the lawyer discovers) many within the community group membership disagree. The lawyer, for her part, believes that leadership is correct on this call, and that the dissenting members, while acting in good faith, are wrong. The responsibility of the lawyer in this thin story is quite clear—her legal obligations and her moral obligations are in sync, and she may respect the instructions of leadership. In doing so, though, the lawyer has not fostered the power of the membership very well, and, indeed, has used her expertise and her professional position to exert some control over the members. She therefore accepts critique on the empowerment theory front. The point is that empowerment as a goal is one among many, and, while it will always serve as a critical factor in the lawyer's moral calculus, it is not a trump.

### *D. Alienation, Oppression, and Positive Freedom*

A simplified view of the empowerment theory and the standard client-centered approach to client counseling shows substantial harmony among their respective goals. The Binder & Price model fundamentally resists techniques of lawyer control;[282] the critics espousing the empowerment theory rail against the persistence of lawyer domination, especially with poor and subordinated clients.[283] A more sophisticated perspective on the lawyer domination topic, however, questions that apparent symmetry. The "refined view" of the critical perspective understands the "autonomy" goals of both projects as not equating to what a client (whether group or individual) happens to choose. A good faith lawyer, as a fiduciary for her client's genuine needs and desires, may resist actively that client's immediate choices. If that sounds like a form of lawyer domination—well, perhaps it is, but it may not necessarily be morally troublesome.

Katherine Kruse is one commentator adopting the more sophisticated perspective.[284] In her critique of the client-centered model of counseling, Kruse notes the importance of both "negative liberty"[285]—the right to do as one chooses—and "positive freedom"[286]—the opportunity to exercise autonomy by reducing constraints on available choices. As Kruse explains, the Binder & Price model un-

[282] *See* LAWYERS AS COUNSELORS, *supra* note 13, at 4-8.
[283] *See* note 276 *supra*.
[284] Kruse, *Fortress in the Sand*, *supra* note 24, at 404-12.
[285] *Id.* at 410.
[286] *Id.* at 404.

dersells autonomy if it only focuses on the negative freedom, aiming to create space for clients to make their own choices. A better practice, at times, would suggest that the lawyer *increase* a client's autonomy by actively working to alter the client's "attitudes, beliefs, or unrealistic expectations."[287] In her development of the positive freedom conception, Kruse relies on the ideas of William Simon, a proponent of a more activist counseling model intended to augment the opportunities for oppressed clients.[288] Simon, in turn, builds upon the "refined" view of paternalism suggested by Duncan Kennedy.[289]

Both Kruse and Simon accept that lawyers working with community groups might have a professional obligation to intervene actively with their clients to assist the clients to get things *right*. As Kruse describes it, a "client empowerment" approach to representation (an approach Kruse finds as "particularly attractive to lawyers working with communities of poor client or of battered women"[290]) might, in appropriate contexts, reject a client's "[s]tated [w]ishes" to overcome "[c]lient misdiagnosis of what the client 'really wants.'"[291] Gary Bellow concurred in this outlook for lawyers working with oppressed communities. For Bellow, community lawyers are "not detached professionals offering advice and representation regardless of the consequences; we saw ourselves as responsible for, and committed to, shaping those consequences."[292]

We might call this version of the empowerment theory the "positive freedom" stance, using Kruse's term.[293] Note that much of the mainstream empowerment theory and community lawyering scholarship arguments are initially hard to square with the positive freedom stance.[294] A best-practices approach to counseling community groups must acknowledge the prevailing voice within progressive scholarship warning community lawyers against committing "interpretive violence" against poor clients[295] and "subordinat[ing] their clients' per-

---

287 *Id.* at 420.

288 *See* Simon, *Mrs. Jones's Case*, *supra* note 103, at 222-24; Simon, *Dark Secret*, *supra* note 34, at 1114.

289 Kennedy, *supra* note 33.

290 Kruse, *Fortress in the Sand*, *supra* note 24, at 423.

291 *Id.* at 420.

292 Bellow, *supra* note 33, at 300. Bellow elaborated: "Alliance is a better term than client-centered. It permits us to talk seriously about purposive judgment—when and whether to intervene or to seek influence." *Id.* at 303.

293 Kruse, *Fortress in the Sand*, *supra* note 24, at 404.

294 Indeed, for that very reason William Simon disdainfully refers to the positive freedom stance (although in quite different terms) as the "Dark Secret" of the progressive scholarship community. Simon, *Dark Secret*, *supra* note 34, at 1102.

295 Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L. REV. 2107, 2123 (1991).

ceptions of need to the lawyers' own agendas for reform,"[296] while noting that "quite a lot of oppression happens in the name of abstract humanist values such as democracy, autonomy and equality."[297] A best-practices approach must at once accept that "the practice of law always involves exercise of power,"[298] especially with marginalized clients, but that community lawyers must exercise that power without committing interpretive violence or "reproducing hierarchy."[299]

Advocates of a "collaborative" approach to community lawyering acknowledge this tension.[300] Missing from those accounts, though, are vivid *stories* of its practiced implementation. The accounts succeed in demonstrating collaboration, and respect for the views of client group members as more reliable than the purported expertise from the professionals.[301] But implicit in the collaborative models, and explicit in the positive freedom stance, is the understanding that marginalized clients might get things wrong, that their good-faith lawyers might discern the clients' "self deception"[302] and their "unrealistic" assessments of their "real needs and interests,"[303] and that those lawyers have an obligation to nurture the client's autonomy by resisting the client's expressed wishes. The literature needs more and better stories showing how the lawyer accomplishes that end without succumbing to the regnant ideas of the lawyer as expert and savior.

While the positive freedom stance may remain a relatively "thin" phenomenon within the critical lawyering scholarship, the proponents of collaborative lawyering (a group not necessarily aligned with the positive freedom advocates) do offer useful insights that might begin to shape a best-practices approach for working with community groups. The best collaborative lawyering writers stress the qualities of humility, transparency, and respect when working with marginalized clients. In a showing of deep respect for victims of oppression, the writers emphasize the strengths within the groups to hear honest opinions, recommendations and proposals from their lawyers without feebly surrendering to the experts' views. Those attributes may inform our effort to understand a practiced approach to the positive freedom stance. That stance tells us that community lawyers who discern "un-

---

[296] Lucie E. White, *Mobilizations on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. Rev. L. & Soc. Change 535, 545 (1987-88).

[297] Steven L. Winter, *Cursing the Darkness*, 48 U. Miami L. Rev. 1115, 1129 (1994).

[298] Bellow, *supra* note 33, at 301.

[299] *See* note 276 *supra*.

[300] *See, e.g.,* Piomelli, *supra* note 276, at 437-40.

[301] *See, e.g.,* López, *supra* note 1; Alfieri, *Impoverished Practices*, *supra* note 1, at 2573-74; Shah, *supra* note 256, at 221.

[302] Kruse, *Fortress in the Sand*, *supra* note 24, at 424.

[303] *Id.* at 420, 423.

realistic" expectations and short-sighted choices within their client groups may possess a moral duty to persuade their clients to arrive at better decisions. In doing so, though, the lawyers need to exhibit humility and tentativeness—qualities which in a different context an observer has called "informed not-knowing."[304]

A more intriguing question for the positive freedom stance considers the limits of a lawyer's manipulation in the interests of aiding clients who are "blinded by the passions of the moment to their long-term interest or deeper values,"[305] or "who are alienated from themselves, or in the grip of self-deception."[306] If we accept the premise that a lawyer owes her client (including, notably, a community group client) her assistance to increase the client's autonomy and positive freedom, and if we accept that lawyers have a reliable capacity to discern when those circumstances exist (and, further, to differentiate those contexts from the very different situations of the lawyer simply disagreeing about tactical issues, or having her own conflicting interests), then we must confront what it is that the lawyer may do to achieve the increase in client autonomy. If the collaborative techniques of honest conversation do not work, the lawyer might actively manipulate or cajole her client to proceed as the lawyer understands the client ought to proceed.

Here is where the positive freedom stance needs rich stories. Without thick narratives available, our instinct must be that manipulation is wrong, for a number of reasons. Manipulation—especially when contrasted with transparent conversation, as here—implies an element of deception, and deception is always presumptively troublesome. Manipulation also assumes a level of confidence on the part of the lawyer that she is *right*, and that confidence must be suspect, especially given the history of professional domination of marginalized persons.[307]

The best one could conclude, then, is the following. A lawyer representing a community group ought to appreciate her discretion to consider the positive freedom perspective, but with a strong burden of proof against its applicability. She might be correct that her client is

[304] Joan Laird, *Theorizing Culture: Narrative Ideas and Practice Principles*, *in* RE-VISIONING FAMILY THERAPY: RACE, CULTURE, AND GENDER IN CLINICAL PRACTICE 21 (Monica McGoldrick, ed. 1998) (quoting V. Shapiro, *Subjugated Knowledge and the Working Alliance: The Narratives of Russian Jewish Immigrants*, 1 IN SESSION: PSYCHOTHERAPY IN PRACTICE 9 (1995)).

[305] Kruse, *Fortress in the Sand*, *supra* note 24, at 424.

[306] *Id.*

[307] The lawyer's confidence might also be the result of common self-serving cognitive distortions. *See* Langevoort, *Epistemology*, *supra* note 47, at 654-57 (describing risks of lawyers' cognitive biases).

succumbing to blind passions or short-sighted misunderstanding, but any such conclusion demands a great deal of confidence on the part of the lawyer. If she concludes that her client indeed fits the criteria for such intervention, then her professional discretion includes active and open challenging of her client's choices—but transparently so, without manipulation, and with considerable humility and tentativeness.

## Conclusion

The training of lawyers for years has established ethical and practice protocols based upon an individual representation model, or, if they contemplated a form of collective representation, they have envisioned formal, structured entities with powerful constituents. The good lawyers who represent the dispossessed, the exploited, and the powerless need to craft different protocols, ones which accept messier, less organized, and often contentious group representation. Writing about the ethical and political mission of "community lawyers" has flourished, but that scholarship has tended to elide some knotty practical questions about the lawyers' professional responsibilities in their work with such groups. This Article is a beginning attempt to review community group representation through the lens of a traditional "law of lawyering" perspective.

A lawyer who accepts a "community group" as her client must attend to all of the professional ethical mandates applicable to more conventional corporate and partnership representation. She must distinguish with great care whether her client is an aggregate of community members, or an entity, and much will depend on the outcome of that discernment. The lawyer must engage the group members to assist them to decide which of those statuses will apply, and, in doing so, she must be clear about her relationship with the members as they make that choice.

If the community group lawyer accepts the *group* as her client, she must uncover, or create, an authority scheme on which she may rely for her direction. Once she has accomplished that, the community group lawyer may counsel her clients in ways different from how she would counsel an individual client with an individual legal matter. In representing any entity, the lawyer will owe to the entity constituents a different—one might say lesser—deference for their preferences and their leanings, because of their status as proxies for a larger client. The more loosely-structured the entity is (and there is much evidence that community group representation will involve many loosely-structured groups), the greater the responsibility of the lawyer to ensure that the constituent with whom she meets is a faithful proxy for the wishes of the group.

In addition to attending to her ethical responsibilities emerging from the very fact that her client is a group, the community lawyer must recognize further special duties from the fact that her client is not just a group, but a *community* group. This Article has uncovered three considerations peculiar to the community group representation context. For those groups with explicit public missions, the lawyer has a responsibility to attend to that mission, in ways she may not have permission to do for groups established to achieve purely private ends. At the same time (and often at odds with the prior commitment), the community group lawyer must attend with special care to the empowerment and group cohesion aspects of the group's work. Finally (and, again, at odds with the prior commitment), the community group lawyer may at times possess some moral duty to intervene with her group client to establish conditions, even if not chosen by the group, which are likely to increase the autonomy and the power of the group in the long run.

The ideas puzzled through in this Article emerge from the rich literature from so many progressive scholars over the past twenty-five years or more. The ideas need to be tested, nurtured and critiqued, though, especially by more stories from the field. The test of the ethical ideas will come from their usefulness in practice.[308]

---

[308] As two noted pragmatists have written:

> Of one thing we may be sure. If inquiries are to have substantial basis, if they are not to be wholly in the air, the theorist must take his departure from the problems which men actually meet in their own conduct. He may define and refine these; he may divide and systematize; he may abstract the problems from their concrete contexts in individual lives; he may classify them when he has thus detached them; but if he gets away from them, he is talking about something his own brain has invented, not about moral realities.

JOHN DEWEY & JAMES TUFTS, ETHICS 212 (1908) (*quoted in* Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 489 (1999)).